

Cases
In The
Privy Council on Appeal
From The
East Indies
1865



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LIST
OF THE
JUDICIAL COMMITTEE
OF
HER MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL,
ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,
FOR HEARING AND REPORTING ON APPEALS TO HER
MAJESTY IN COUNCIL.

1861-2-3-4.

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The Duke of *Buccleugh*, formerly Lord President.
The Marquis of *Salisbury*, late Lord President.
The Earl *Lonsdale*, formerly Lord President.
Lord *Westbury*, Lord High Chancellor of Great Britain.
Lord *Lyndhurst*, formerly Lord High Chancellor (deceased).
Lord *Brongham*, formerly Lord High Chancellor.
Lord *Campbell*, late Lord High Chancellor (deceased).
Lord *Cranworth*, formerly Lord High Chancellor.
Lord *St. Leonards*, formerly Lord High Chancellor.
Lord *Chelmsford*, formerly Lord High Chancellor.
Lord *Wensleydale*, formerly one of the Barons of the Court of Exchequer.
Lord *Kingsdown*, formerly Chancellor of the Duchy of Cornwall.
The Right Hon. *Thomas Erskine*, formerly one of the Judges of the Court of Common Pleas (deceased).

The Right Hon. *Stephen Lushington*, D. C. L., Judge of the Admiralty Court.

The Right Hon. Sir *James Lewis Knight Bruce*, Knt., one of the Lords Justices of the Court of Appeal in Chancery.

The Right Hon. Sir *James Wigram*, Knt., late one of the Vice-Chancellors.

The Right Hon. Sir *Edward Ryan*, Knt., formerly Chief Justice of the Supreme Court at Calcutta.

The Right Hon. Sir *Frederick Pollock*, Knt., Lord Chief Baron of the Court of Exchequer.

The Right Hon. Sir *John Romilly*, Knt., Master of the Rolls.

The Right Hon. Sir *George James Turner*, Knt., one of the Lords Justices of the Court of Appeal in Chancery.

The Right Hon. Sir *Alexander J. E. Cockburn*, Bart., Lord Chief Justice of the Court of Queen's Bench.

The Right Hon. Sir *Cresswell Cresswell*, Knt., Judge of Her Majesty's Court of Probate and Divorce (deceased).

The Right Hon. Sir *John Taylor Coleridge*, Knt., late one of the Judges of the Court of Queen's Bench.

The Right Hon. Sir *William Erle*, Knt., Lord Chief Justice of the Court of Common Pleas.

The Right Hon. Sir *James Plaisted Wilde*, Knt., Judge of Her Majesty's Court of Probate and Divorce.

ASSESSORS.

The Right Hon. Sir *Lawrence Peel*, Knt., formerly Chief Justice of the Supreme Court at Calcutta.

The Right Hon. Sir *James William Colvile*, Knt., late Chief Justice of the Supreme Court at Calcutta.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

MUSSAMUT KHOOB CONWUR, guar-
dian of BABOO BIJNATH PER-
SAUD, the minor son of Baboo
Deanut Roy, deceased, BABOO } *Appellants,*
JOYKURRAN LAUL, MUSSAMUT
CHEYT CONWUR, and TEK
CONWUR ... }

AND

BABOO MOODNARAIN SINGH, and,
after his death, MUSSAMUT IS-
MEDIA CONWUR and SUNDEEP } *Respondents.**
CONWUR, the widows of Baboo
Moodnarain Singh ... }

*On appeal from the Sudder Dewanny Adawlut at
Calcutta.*

THE suit, brought by *Baboo Moodnarain Singh*
against *Mussamut Man Konwur* and others, was
of the nature of an action of ejectment to obtain

27th & 28th
Nov. 1861.

Suit in the
nature of
ejectment to
recover pos-
session of
certain *mou-
sahs*, and to
set aside a
sunnud, or
deed, under

*Present : Members of the *Judicial Committee*,—The Right Hon.
the Lord Justice Knight Bruce, the Right Hon. the Lord Justice
Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right
Hon. Sir James W. Colville.

- which they were held, on the allegation that the deed, had been altered
• after execution, and its purport entirely changed by the insertion of words

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possession of certain *mouzahs*, or villages; and also to set aside and cancel so much of a *synnud*, or deed, in the persian language, as purported to be a grant and conveyance of the villages in question, which was alleged by the Plaintiff to be a forged and fabricated document, so far as regarded certain defacements that appeared on the face of the deed. The fact of the execution of the original document by the late *Maharajah Mitterjeet Singh*, the father of the Plaintiff, was admitted in the suit.

The principal question raised in the Court below and upon appeal had reference to the impeachment by the Plaintiff of this instrument. The contention of the Plaintiff was, that the original deed was a lease only for the life of the grantee, and had been fraudulently altered by the Defendants, or those under whom they claimed, by inserting words of limitation giving hereditary rights. The Defendants' case was, that the deed had been defaced by, or through the means of the Plaintiff while in the custody of the Record-keeper of the *Sudder Ameen* Court, pending a suit there in the year 1842, and that it was originally a grant in fee.

The material evidence and the facts of the case are fully stated in the judgment of their Lordships.

of limitation, creating hereditary rights. The decrees of the Courts in India respecting the alleged alterations being conflicting, the Judicial Committee, upon motion to that effect, ordered the original deed to be transmitted for inspection at the hearing of the appeal.

Though the *onus* of proof of the genuineness of an instrument in its altered state lies upon the party producing and claiming under it, yet the altered and suspicious appearance of the instrument may be explained by proof of its original state when executed, and its existing state sufficiently accounted for, to rebut the presumption of the deed having been falsified and tampered with after execution by the party claiming under it.

The Judicial Committee upon appeal reversed the decree of the *Sudder Dewanny Adawlut*, and upheld the deed, as originally containing the words of limitation, being satisfied that the deed had been tampered with while in the custody of the Record-keeper of the *Sudder Ameen's* Court.

ON APPEAL FROM THE EAST INDIES.

• The deed in question was under the seal of the late *Maharajah Mitterjeet Singh* in favour of *Lalla Hoonooman Dutt*, one of the sons of *Roy Pritee Singh*, the *Dewan* of the *Maharajah*, and since deceased, reserving a rent of S. Rs. 1,880, payable yearly into the treasury of the *Maharajah*.

This instrument, translated, as it appeared when filed in this suit, was as follows:—"Mocurrery sunnud, dated 8th *Shaban*, 1209 (1st of *March*, 1795) *Hijree*. *Pottah Kaul Kurar* (by way of agreement)." "This *Mocurrery Istemrari*, in the name of *Lalla Hoonooman Dutt*, 'O mai broderan *Huckkee*, nuslun bad nuslun, O butnun bad butnun' (and together with uterine brothers from generation to generation), of *mouza*hs, *Irkee*, with the *chucks* appertaining thereto, and *Chelowree*, in *Purgunnah*, *Sunwot*; and *Jumowwan*, appertaining to *Purgunnah*, *Bhilawur*; and *Muniaraburdhia*, *Sukhea*, and *Sarsara*, appertaining to *Purgunnah*, *Nurhut*, *Puttie* (division) *Katowa*, as per the following schedule, is, without objection, given at an absolute and fixed *jumma* of Rs. 1,880 (a moiety of which is S. Rs. 940), of the current coin, and of the full weight and value, from the *Fuslee* year 1202, with the exception of one thousand two hundred *becgahs* of land for *Khyrat*, *Bishenpret*, *Sayer Rahdaree*, *Chaharumtar*, and embankments. The persons alluded to should confidently believe themselves to be the actual *Mocurreydars* of the aforesaid *mouza*hs, keep in good faith the tenants satisfied and pleased, till and cultivate the *mouza*hs with care and attention, and pay the rent thereof, according to the *Kaul Kurar* (terms) of the *Pottah Mocurrerys Istemrari*, *Lal ba Lal* (year by year) into my treasury, without any objection on the

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score of drought and inundation, which they must consider as appertaining to their *Mocurrery* tenure. Whatever profits they may derive from the attention and care to be bestowed by them on the *mouzahs* in question, will, of right, belong to the *Mocurreydar*s. The tenants and cultivators of these *mouzahs* will consider the persons alluded to as '*Mocurreydar nuslun bad nuslun*,' and exert themselves to their full in cultivating the lands. They should consider all praises and defamation of the *Mocurreydar* as affecting themselves. Save and except the fixed rent, not a single *pice* will be demanded from the aforesaid *Mocurreydar*. Consequently, these few words are written as a *Mocurrey* and *Istemrary sunnud*, that it may be a document hereafter." The deed was registered.

This deed, when produced at the hearing, bore marks of erasures, alterations and defacements, particularly in the expressions which created the limitation of hereditary rights.

On the 2nd of June, 1851, the suit out of which the present appeal arose was commenced, after a possession of fifty-six years from the date of the execution of the deed, and after a possession of thirty-two years by the successive heirs, who inherited the *mouzahs* since the death of *Lalla Hoonooman Dutt*, the original grantee, and more than twelve years after the title of *Moodnarain Singh* accrued. The plaint was filed by *Moodnarain Singh* against *Mussamut man Conwur*, since deceased, *Mussamut Tek Conwur*, *Mussamut Necm Conwur*, since deceased, *Lalla Deanut Roy*, *Joykurran Laul*, *Inderjeet Singh*, *Totnam Sheo Suhac Singh*, and *Mullick Dawur Hossein*, and sought to recover the possession of the *mouzahs*, by 'cancella-

tion of the deed, which was charged by the plaint to be a spurious *Mocurrery Pottah*, and for the recovery of Rs. 46,800, on account of mesne profits, appropriated from 1249 to 1257 *Fuslee* era, corresponding with 1841-2, and 1849-50 A. D. The plaint alleged, that the *Mocurrery sunnud*, admitted to have been executed by *Maharajah Mitterjeet Singh*, was only an *Istemrary Pottah*, and contained originally a grant of the *mouzahs* for the term of the life only of *Lalla Hoonooman Dutt*, the grantee; and that from *Roy Prithee Singh* his father having been then, and his grandson, *Lalla Nujee Laul*, having been afterwards, *Dewan* to the *Maharajah*, everything was in their management, and that he, the Plaintiff, was kept in ignorance of the true nature and condition of the *Mocurrery sunnud*; and the plaint charged that the *sunnud* was forged; that the Defendants having erased therefrom the words "*Istemrar*," and substituted the words, "*Mai broderan Huckekee, O nuslun bad nuslun, O butnun bad butnun*," ("with brothers uterine, and seed after seed, and womb after womb"), it ought to be cancelled; and that, according to the Hindoo law, and also according to the Regulations of Government, *Maharajah Mitterjeet Singh* had no power to make such a *Mocurrery Istemrary* settlement of any of the villages in his ancestral *Zemindary*, as the Defendants relied upon.

The answer of the Defendants alleged, that the *sunnud* was tampered with and defaced while deposited in Court, pending another suit, by the Plaintiff and his servants, in collusion with the Record-keeper. The answer also stated, that when *Lalla Hoonooman Dutt*, the grantee, died in the year 1818-19, his heirs and those of his brothers remained in possession of the land

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for a longer period than twelve years previous to the bringing of the present suit, and relied on the provisions of the *Ben. Reg.* III. of 1793, sec. 14, as a bar to the suit.

The hearing of the suit took place on the 5th of August, 1854, when the principal *Sudder Ameen* (*Syed Mahomed Rafiq Khan Bahadoor*) of the Civil Court of *Behar* made a decree, supporting the deed, on the ground that the Court did not find that the deed had been tampered with or erased by the Defendants. The *Sudder Ameen* in his judgment expressed his opinion that, "On inspection of the *Mocurrery* document, it appeared clear that the words, '*mai brotheran, Huckeekee, nuslun bad nuslun*,' in the first line, and '*butnun bad butnun*,' in the second line, and again, '*nuslun bad nuslun*,' in the twelfth line, which have been tampered with and defaced with a pen, originally existed in the deed, but had, while in the office of the *Sudder Ameen*, been so tampered with and defaced by corrupt and unprincipled men. Besides, it appeared from copy of the same document, given under the seal of the *Casi*, and filed by the Defendants, that it was not written solely in the name of *Lalla Hoonooman Dutt*, as the Plaintiff contended it was, but was written exactly as the Defendants stated it was; because it abounds with plural terms, such as, 'persons alluded to,' '*Khorda*' (themselves), '*Kunnud*' (ditto), '*Ahenasund*' (recognized), which stand in their original features, and have not been at all tampered with or defaced. Had the document been originally written in the name of one individual, what was the reason of using the above plural terms?"

The Plaintiff appealed from this decree to the *Sudder, Dewanny Adawlut* at *Calcutta*, and on the

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31st of *December*, 1856, that Court, consisting of Messrs. *Colvin*, *Scqnce*, and *Torrens*, pronounced a decree reserving the decree of the Civil Court, and adjudging possession to the Plaintiff. The judgment was as follows:—"As both parties admit that an effacement of the document has occurred, we have no inquiry to make on the bare fact. It is shown to have remained in the custody of the Respondents up to the date of its delivery to the *Sudder Ameen's* Court on the 9th of *February*, 1842; and if alteration, not mere effacement, as pleaded by Respondents, has taken place, it is clearly, as argued by Mr. *Allan* on the part of Appellant, for Respondents to show that such alteration was not effected at their instance. Having very fully considered the proceedings held by the *Sudder Ameen* in 1842, we find nothing therein whatever to show or lead even to the remotest conclusion either that the tampering extended merely to an effacement so as to be consistent with the allegations against Appellants on this point, or that there was anything but a downright and positive alteration of the terms of the document, extending to a change of the title in the tenure, so as to render it beneficial to the claim of the Respondents. It is to be recollected that Respondents impute to Appellant only that the true and existing Persian characters in the document, where it refers to hereditary rights, had been blemished at the instance of the Appellant or the officers, by collusion with the *Sudder Ameen's Amlah*, so as to make it appear that the words and characters had been altered, when, in fact, they stood as originally inserted. Now, we have intrinsic evidence, in the words and context of the documents, that this representation of the Respondents cannot be correct.

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In the first place, we observe at the commencement of the *Pottah*, where it is usual to specify the name, residence, and birth of the recipients of a tenure of the kind, that, after the name '*Hoonooman Dutt*,' there occurs a very palpable erasure and interpolation, not a mere defacement of characters before existing; and the *Pottah* is made to run that is was given to the above, and, according to the words occurring after his name, to his brothers and heirs—'*O mai brodeeran Huckeekee, nuslun bad nuslun, O butnun bad butnun*.' The copulative conjunction here used would, to make the passage at all idiomatic, have been altogether unnecessary, except that the difficult and somewhat ingenuous erasures and interpolations made required its introduction; and the insertion of the condition of the tenure in this part of the *Pooth* is as altogether singular as the omission of the residence of the *Mocurreydar*. The insertions of the recipient's own brothers in general is likewise, quite unusual; and the words used, as well as the evident erasure of the Persian characters, most fully denote a positive alteration. Next, it is to be observed that Respondents do not contend that any defacing took place except at this part of the document and lower down, where the words '*nuslun bad nuslun*' afterwards occur; but, looking very carefully over the document opposed to the view of the principal *Sudden Ameen*, we find that the verbs and pronouns have been most palpably 'altered from the singular to the plural, so as to make the sequel of the deed correspond with the insertion of the words '*mai broderan Huckeekee*'—that is, it was granted in favour of *Lalla Hoonoomun Dutt*, along with his own brothers, instead of, as the Appellant contends, to *Lalla*

Hoonagman Dutt only for life. Thus, where the pronoun '*khoddra*,' alluding to the conditions which the single *Mocurreydar* was himself to perform, occurs throughout the document, the word has been altered to the plural '*khoddhra*;' so, likewise, in the words specifying what the *Mocurreydar* was to consider himself liable for, what to perform, and how to treat the estates and *Ryots*, the verb is throughout most palpably altered from the singular to the plural. The above description of the document shows at once, without any doubt whatever in our minds, that the terms were actually altered, and that there had not been merely defacements perpetrated by Appellant; and as such alterations are altogether fatal to the Respondents, it is ordered that the decision of the lower Court be reversed, and that a decree for possession, with *wassilat* from date of suit, and costs, be passed in favour of Appellant."

The Appellants filed a petition in the *Sudder Dewanny Adawlut* for a review of judgment, and they offered to produce fresh evidence, and, amongst other documentary proofs, the Registrar's book, containing the copy of the original *Sunnud*, as it had been discovered after the decree of the *Sudder* Court had been made; that the old books were not really missing, as had been reported by the Registrar of deeds, but that they were found extant in the office of the Judge. The Appellants produced, with their petition, a copy from the Judge's office and from the Registrar's books, of their original *Sunnud*, from which, as it was stated in the petition, the fraud of the Plaintiff would be apparent and proved. The Judges of the *Sudder Dewanny Adawlut*, by a

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proceeding of the 30th of *May*, 1857, rejected the application for the review of judgment.

The Appellants appealed to England from the decree of the 31st of *December*, 1856. After the transcript had been transmitted to England,

Mr. *Leith*

6th Feb.
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Moved for an order on the Court of India to transmit the original Persian deed to England for inspection of the defacements at the hearing, as was done in the cases of *Mc Carthy v. Judah (a)*, and *Mason v. The Attorney-General of Jamaica (b)*.

Lord KINGSDOWN :

We think, in the circumstances, that the application is reasonable, and will make an order directing the transmission of the deed.

The deed was sent to England and inspected by their Lordships, and a Persian translator examined the same at the hearing of the appeal.

Mr. *Forsyth*, Q.C., and Mr. *Leith*, for the Appellants, in support of the appeal.

Insisted, first, that independently of the *sunnud*, it was sufficiently established from the admissions of the Plaintiff, that the *mouzahs* in question were granted by the late *Maharajah* in perpetuity, and under an hereditary tenure ; and the finding of the *Zillah* Court of *Behar*, that the Plaintiff, or the Record-keeper, had sur-

(a) 6 Moore's P. C. Cases, 47. (b) Moore's P. C. Cases, 228.

* Present : Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Faylor Coleridge,

[reptitiously caused the alterations and defacement of the *sunnud*,* was supported by the evidence in the cause. Second, that as the suit was in the nature of ejectment, the Plaintiff could not recover, the Appellants having had from the death of the grantee a good possessory title for thirty-two years against the Plaintiff, and that the suit was, therefore, barred by effluxion of time citing *Ben. Reg. III. sec. 14. of 1793.* They also referred to *Ben. Regs. V. of 1812, sec. 2., and VIII. of 1819, sec. 2,* as to the power of the *Maharajah* to alienate a part of the *Zemindary*.

The Solicitor-General (Sir. *R. Palmer*), and Mr. *W. Field*, for the Respondents,

Contended, first, that the instrument in question was a lease, and was granted only for the life of *Lalla Hoonooman Dutt*, and that the words of inheritance therein contained, as it appeared from the instrument itself, had been fraudulently interpolated by the Appellants, or those under whom they claimed; that the limitation was expressed by the Persian words "*Mocurrery Istemrari*," which by themselves did not convey hereditary rights, and had been so registered, without any mention of any hereditary rights being transferred; and they further insisted, that the deed must be strictly proved to render it admissible in evidence. *Bunwaree Lal v. Maharajah Hetnarrain Singh (a).* And, secondly, that the *Maharajah*, being in possession of the *Zemindary*, which was ancestral property, had no power while a legitimate son was living to alienate the *mouzahs* in perpetuity, which would be the case if the deed could be supported with the words of inheritance which it purported to contain.

• (a) 7 Moore's Ind. App. Cases, 148.

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Judgment was delivered by

The Lord Justice Knight BRUCE.

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The facts upon which this appeal arises may be thus stated. In the year 1795, *Maharajah Mitterjeet Singh Bahadoor*, who appears to have been a person of considerable position in the Province of *Behar*, granted a *Mocurrery Istemrary* lease of the property which is the subject of this suit. That the grant was by a *sunnud* in the Persian language; and that the instrument produced in the cause is that *sunnud*, and bears the genuine seal of *Rajah Mitterjeet Singh*, are undisputed facts. It is also admitted, that the only grantee described by name was *Lalla Hoonooman Dutt*, the eldest son of *Roy Prithee Singh*, who, at the date of the grant, and for many years afterwards, up to the time of the death, was the *Dewan* of the grantor. But the substantial question in the cause is, whether the grant was expressed to be to *Lalla Hoonooman Dutt*, solely and simply, or to him "together with his uterine brothers from generation to generation;" in other words, whether the Persian words which now appear on the face of the *sunnud*, and import the addition in question, have, as the Respondents contend, been fraudulently substituted for other words, or, as the Appellants insist, have always formed part of the document.

On the former hypothesis the tenure would, as the law has been settled by a course of decisions, commencing at latest in the year 1817, have determined with the life of *Lalla Hoonooman Dutt*. The addition of words importing "from generation to generation," would make the grant one of a perpetual lease to *Lalla Hoonooman Dutt* and his heirs. The

further addition of the other words in question would, of course, make it one to him and his brothers jointly, and to their respective heirs. *Lalla Hoonooman Dutt* had two brothers, *Gumess Dutt* and *Mahadeo Dutt*; and some time in 1806 or 1807 a partition of the property comprised in the *sunnud* was made between the three, by or with the sanction of their father, *Roy Prithep Singh*. He died in 1839. His son, *Lalla Hoonooman Dutt*, certainly predeceased him, and though the precise date of his death is not clearly proved, there seems no reason to doubt that it took place, as stated by the Appellants, in or about the year 1819. In 1839, *Rajah Mitterjeet Singh* granted to his son, *Moodnarain Singh*, a *Tekka* lease of his interest in certain *mouzahs*, including those in question in this suit; and the latter were then treated as being still the subject of a subsisting *Mocurrery* tenure. In 1840 the *Rajah* died, leaving two sons, *Hetnarain Singh* and *Moodnarain Singh*. They made a partition of his estate, and the property in question fell to the share of *Moodnarain Singh*. On that occasion it was again treated as held by a subsisting *Mocurrery* tenure, a circumstance which must have been considered in estimating the share to be allotted to each brother.

In 1841, *Moodnarain Singh* instituted three separate suits, conformably to the devolution of the property under the Appellants' version of the original lease, for the recovery of arrears of *Mocurrery* rent alleged to be due in respect of certain *mouzahs*, parts of the property comprised in the *sunnud*, and claiming to have the *Mocurrery* tenure in those *mouzahs* respectively cancelled, on the ground of the arrears. These proceedings, therefore,

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assumed the existence of the *Mocurrery* tenure in the lands in question in 1841; and also that they were thus held in severalty by the descendants of *Roy Prithee Singh*, recognizing to that extent the partition of 1807. In one of these suits, and on the 9th of *February*, 1841, the original *sunnud* was produced by the representatives of *Lalla Hoonoomun Dutt*. On the following morning, if not on that night, it was inclosed in an envelope sealed with the seal of the Court. It was certainly from the time of its production up to the 22nd of *March*, in the custody of the Court. On the last-named day the envelope was opened in Court in the presence of the *Vakeels* of both parties. The appearances which cast suspicion on the *sunnud* were then for the first time discovered. On the 30th of *March*, 1842, the *Sudder Ameen*, before whom the case was pending, passed a decree in favour of the Plaintiff for a small sum of arrears, but dismissed his suit so far as it sought for the cancellation of the tenure. On the same day he proceeded to hold an inquiry into the supposed tampering with the *sunnud* whilst in the custody of the Court. His proceeding resulted in the dismissal of the Record-keeper.

There were various other proceedings in these suits of 1841 by way of appeal to the *Sudder Adawlut*, and of remand to the Court below, and in the Course of the litigation *Moodnarain Singh* appears to have raised, by petition of amendment, some new issues founded on the appearance of the *sunnud*. The three suits, however, seem to have been finally disposed of by the decree of the *Sudder Ameen*, dated the 17th of *June*, 1846. The effect of the decision was that the Plaintiff was entitled to some arrears of *Mocur-*

very rent though to considerably less than the amount claimed by him and that he had shown no ground in those suits for the cancellation of the tenure.

From 1846 to 1851, *Moodnarain Singh* took no step; in June of the latter year he commenced the present suit, which embraces the representatives of all the three sons of *Roy Prithce Singh*, and is for the recovery of the whole property comprised in the *sunnud*, with mesne profits since 1842, and for the cancellation of the *sunnud*, as spurious.

His case, so far as it is necessary to state it, is that the *Sunnud* as granted by his father was a grant of a *Mocurrery Istemrary* lease to *Lalla Hoonoomdn Dutt* alone, and, therefore, that the tenure legally determined on *Lalla Hoonooman Dutt's* death; that the document has been fraudulently altered by those who claim under it, the Persian words importing a grant in favour of his brothers jointly with *Lalla Hoonooman Dutt*, and of the heirs of all in perpetuity, having been written in substitution of words descriptive of *Lalla Hoonooman Dutt*, or of other words erased, and words in the singular number having throughout been converted into words plural, wherever the alteration was necessary to make the instrument consistent. He tries to explain the continued enjoyment of the lands, as under a *Mocurrery* tenure after *Lalla Hoonooman Dutt's* death; and other circumstances which are apparently inconsistent with his theory of the original grant by the alleged influence of *Roy Prithce Singh* over the *Maharaja*; and malversations in office by him and his grandson and successor in the *Dewanship*.

The case of the Defendants is also that the *sunnud*, as it now exists, has been tampered with, but they

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contend that this tampering took place whilst the document was in the custody of the *Sudder Ameen's* Court in 1842, and was the act of the Plaintiff's agents in collusion with the Record-keeper; that it consisted only in disfiguring certain material passages of the instrument without altering its tenor, in order to cast suspicion upon it, and to give colour to the case now made against it. They also insisted that the present suit was barred by lapse of time under the Regulation of limitation.

It does not very clearly appear whether there has been any adjudication on this last plea. The *Sudder Adawlut* treated it as decided by the *Sudder Ameen* against the Defendants, who had not appealed against his decision. But in the proceedings before this Committee there is no trace of any order of the *Sudder Ameen* on this plea against which the Defendants could have appealed. His final decree of the 5th of August, 1854, is in their favour.

Proceeding much upon the finding of his predecessor on the inquiry of the 30th of March, 1842, into the conduct of the Record-keeper, he adopts the Defendants theory of the tampering, and thereupon dismisses the Plaintiffs' suit, declining to consider any of the other issues in the cause. He relied also on a copy of the lease bearing the *Cazi's* seal, which was given in evidence by the Appellants and is consistent with their case.

On appeal this decision was reversed by the *Sudder Adawlut*, which held that there had been a fraudulent alteration of the terms of the *sunnud*, and decreed in favour of the Plaintiff. On a second hearing of the case upon a petition for review of judgment, the Court adhered to its former decision, and rejected

some fresh evidence that was tendered on that part of the Appellants. The propriety of that rejection is not now questioned, but against the substance of the decree of the *Sudder Adawlut*, the present appeal is preferred.

The decision of the *Sudder Court* rests entirely on the evidence which, in the opinion of the Judges, the inspection of the document and the consideration of its contents afforded of the falsity of the explanation of its suspicious appearance given by the Appellants. Their judgment affords no ground for concluding that the corroborative proofs in support of the Appellant's case had been duly presented to the Court, and overruled by them. Their Lordships, however, think this case cannot be properly decided without weighing the whole evidence on either side, and applying the presumptions from conduct thence fairly arising, to the consideration of the opposite statements or theories with respect to the alteration of the instrument, that have been put forth by the respective litigants. It may be conceded that, in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document.

But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And, such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would

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prove the original condition and import of the suspected document. Moreover, the peculiarity of the present case is, that one of the issues to be determined is, what was the condition of the document when it was first produced by those who claim under it. The Appellants may fairly contend, that the rule above stated is not applicable to them, until this question has been decided against them.

In dealing with the whole evidence, their Lordships will first consider that derived from the actual inspection of the document.

After close and careful examination, they are unable to concur in the conclusion of the Judges of the *Sudder Adawlut* that such inspection alone affords decisive proof of positive alteration by erasure. It would, in the opinion of their Lordships, be a most difficult, if not impracticable, task, to efface by erasure, on paper such as that on which the *sunnud* is written, words covering the space which a full line would occupy, without plainer signs of that mode of tampering, than any which this document presents. Their Lordships would expect to find on paper of this quality so dealt with, more breaking of the surface, more running of ink into blots, and a more decided attenuation of the substance of the paper, discernible from a view of its reverse side when held to the light. They are also struck by the apparently insurmountable difficulty of so completely erasing so many words, that no trace of original words or letters should be discernible with the aid of a strongly magnifying glass. The nature of the particular paper and ink seems to render so perfect an erasure so improbable, that success in the attempt is not readily to be conjectured. Yet

the fact of alteration by erasure is essential to the Respondent's case.

Again, the addition of a plural termination to the pronoun "*khud*," an addition totally unnecessary on either theory of the original import of the instrument, is capable of being attributed to either side. If a falsifier of this instrument had grammatical skill enough to see the propriety of converting the singular nouns and verbs into the plural, it is reasonable to suppose that he would know, as their Lordships believe to be the case, that the pronoun "*khud*" was applicable to either number. To add a plural inflection to it would be to impose upon himself in that place an additional difficulty. The existence of a single noun in the singular where the strict sense required it to be in the plural would, in a case unattended with suspicion, naturally be ascribed to oversight or ignorance, or to the use of a singular noun in a collective sense. The word "*Mocurredar*" remains in this instrument in the singular where the plural termination "*an*" should have been added. This, it was contended, proved that the document, as it originally existed, had contained only the name of a single person as "*Mocurredar*." That argument assumes that the falsifiers had overlooked in a short instrument an important word, and whilst altering the other words, had by oversight neglected to convert that word into the plural. Such an oversight certainly may have occurred; but it is at least as probable a conjecture that the word stood originally in the singular, and was either advisedly used in a collective sense, or was inserted by misadventure in the singular instead of the plural number. The words in the singular, though ungrammatical, would not

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have been inconsistent with the operation of the instrument for which the Appellants contend; their existence now in the plural cannot be relied on as in itself alone decisive evidence to turn the scale in a doubtful case against the Appellants, the Respondent's theory of erasure presenting, on the inspection, difficulties no less grave. The case on the argument founded on mere inspection cannot be viewed as other than a doubtful one.

The Appellants meet the arguments against them, with those which the appearance of the letters as blurred over and painted, the improbability of so great an erasure leaving so faint a trace, and the presence of the trace of the letter "*mim*" above the line, afford in confirmation of their theory of the tampering. The appearance of the paper in that part is certainly favourable to the supposition that that letter there existed, and its existence there is not reconcilable with the theory that words of mere description occupied originally the place where the disputed words are now found. On the whole, then, the inspection appears to their Lordships to furnish no certain or satisfactory grounds for deciding the case.

The next material inquiry is, what evidence is there as to the state of the instrument when first produced? This, so far as it goes, is in favour of the Appellants. If the document was fraudulently altered by them, it must presumably have been so altered before it was produced in Court in the year 1842. It is not conceivable that they would produce an instrument destructive of their own title, which in the ordinary course would be examined on its first production, on the chance of being able fraudulently

to alter its tenor whilst it was in the custody of the Court. Again; if the alteration was made before its production in 1842, the document must then have presented appearances even more suspicious than those which it now presents; since the lapse of eighteen years, and frequent manipulations in Court, must have tended to soften rather than to aggravate the marks of tampering. Those appearances could hardly have escaped the attention of one conversant with the Persian language who then examined the instrument. The *Sudder Ameen*, however (a Mussulman by his name, and, therefore, presumably the more conversant with Persian), has in a solemn proceeding declared, that he did carefully peruse the paper when it was produced, that it did not present the appearances which it afterwards presented, and that, if these had then existed, he must have observed and would have recorded their existence. He added that his attention to this part of his duty was well-known. The Solicitor-General sought to avoid the effect of this statement by suggesting that the *Sudder Ameen*, conscious of having neglected his duty, sought to avoid responsibility by stoutly asserting its performance, and throwing blame upon an innocent subordinate, his Record keeper. It is to be remarked, however, that his argument assumes the point in dispute, and it is further to be observed, that the Judge followed up his declaration by an important act, the dismissal of the Officer; and that there is no trace of any appeal from that act to any superior authority. The argument then assumes a violation of duty, of which there is no proof; and their Lordships cannot treat

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the declaration of this native Judge, so solemnly and publicly made, as undeserving of credit.

It is next to be considered whether the Respondents have satisfactorily accounted for the non-production of evidence which would naturally be in their power, and would conclusively show what were the terms of the original grant. The evidence for the Respondents shows that there was, as in the ordinary course of business there would be, a *Kuboolyet*, or counterpart of the *Mocurnery* lease executed by the grantee to the grantor. His witnesses state that in 1839, when *Baboo Moodnarain Singh* took the *Teeka* lease from his father, inquiry was made about this *Kuboolyet*; and that *Nujeeblall*, the grandson of *Roy Prithee Singh*, who then acted as *Dewan*, stated that it was lost. The imputation on *Nujeeblall* seems to be that he or his grandfather abstracted this and other papers. The explanation, however, cannot be accepted as satisfactory. It is said that at the time it did not satisfy either the *Maharajah* or his son; and it is not easy to see why the latter, who seems even then to have been sufficiently alive to his own interests, did not take other steps either to enforce the production of the paper, or to ascertain by other means what was the purport of the original grant. The statement of *Nujeeblall* was calculated to excite rather than to allay suspicion.

It is, moreover, difficult to conceive that, independently of the *Kuboolyet*, and of the copy in the missing register-book, there has not been in the family of *Maharajah Mitterjeet Singh's* clear knowledge of the terms of the original and admitted grant of the tenure in question, at least during a considerable part

of the long period of enjoyment under it. It is no doubt suggested that the *Maharajah* was, in the latter part of his life at least, incapable of attention to business, and much under the influence of his *Dewan*. But there is no proof, and hardly a suggestion, of such incapacity in 1795, or for many years afterwards.

It is consistent with the habits of men of his rank to attend to and have a knowledge of their affairs, and to hold a sort of domestic *forum* for the transaction of business in their *Cutcherries*. The grant of a *Mocurrery Istemrary* lease to the son, or sons of the *Dewan*, and probably in recognition of his services, was an act likely to take place with some pomp and publicity. The terms of the grant would be notorious to many; they are not likely to have soon slipped from the memory either of the *Maharajah* or of those of his dependants to whom they were known. Yet when we come to test the truth of the conflicting statements as to those terms by the presumptions arising from the conduct and acts of both families, what do we find? Their Lordships would not lay much stress on the mere fact that some of the family of *Roy Prithee Singh* continued in the enjoyment of the tenure after the death of *Hoonooman Dutt*. This, though *prima facie* inconsistent with the Respondents' case, might be referred to the favour shown by the *Maharajah* to the family of the *Dewan*. But in 1807, when the grant was still comparatively recent, we have the partition between the sons of *Roy Prithee Singh*. That was a transaction perfectly consistent with the *sunnud* as it now stands, but utterly inconsistent with the hypothesis that the grant was to *Lalla Hoonooman Dutt* alone, and for life only. It

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was a transaction which can hardly have escaped the knowledge of the *Maharajah*, or of those who would soon have made it known to him. If it were known to him, he could not have treated it as other than an impudent usurpation, and an alteration of the terms of his grant to his prejudice effected by his *Dewan*, unless he was conscious that it was in fact consistent with the true import of the grant, and authorized by it.

Again, this partition was clearly known to *Baboo Moodnarain Singh* when he commenced the suits of 1841, if not when he took the *Teeka* lease in 1839. The very form of his proceedings recognized this partition, and admitted the subsisting rights of *Mocurredars*, though long after the death of *Lalla Hoonooman Dutt*, and this at a time when he was hostile to them. This act of his is conceivable if the terms of the grant were known to be what the Appellants say they were; inconceivable, if they were known to be what the Respondent says they were; and highly improbable if they were then doubtful.

It is also obvious that, when the partition took place between *Baboo Moodnarain Singh* and his brother, the traditions and belief of the late *Maharajah's* family must have been in favour of the existence of a valid *Mocurrery* tenure in these lands; and the fact that they were held in severalty by the divided branches of *Roy Prithee Singh's* family must have been notorious.

Here again is a solemn act of the grantor's family which is consistent with the Appellants' case, and inconsistent with that of the Respondents. The evidence of the Respondents' witnesses as to the *Kaboolyet* is also inconsistent with a statement in his pleadings concerning them, which remarked upon by Mr. *Forsyth* in his reply.

Their Lordships think that by the presumptions thus arising from the acts and conduct of the parties during a long series of years, this case must be decided. They do not say that it is free from difficulty, of that either side has succeeded in explaining satisfactorily the state of the Persian *sunnud*. But against whatever inference to the prejudice of the Appellants may be drawn from that circumstance (and it is at least doubtful whether any such can fairly be drawn), may be set the presumption arising from the non-production of the *Kaboolyet* by the opposite party. The actors in the original transaction are all long since dead, and the Respondent is seeking to recover the property from those who have been for many years in the enjoyment of it. In any view of the case, he has been guilty of great laches in the assertion of his alleged rights. The difficulties (if any) which arise from the loss of evidence, and the other consequences of lapse of time, ought, in justice, to fall on him.

It is essential to his case to establish that the original grant was to *Lalla Hoonooman Datt* alone, and for life only. The weight of the evidence, independently of the disputed *sunnud*, seems to their Lordships to be against this allegation, and in favour of the title insisted upon by the Appellants; that preponderance of proof is also necessarily in favour of the Appellants' theory of the alteration of the document.

The copy of the lease, verified by the *Casi's* seal, cannot be treated as any corroboration of the Appellants' case, as there is a total absence of evidence concerning the time, mode, and cause of its execution and presentation to the *Casi*.

This being their Lordships' view, it is unnecessary

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to consider whether the plea that the suit was barred by lapse of time and the Regulations of limitation is still open to the Appellants, or could have been successfully maintained by them.

Upon the merits of the case, their Lordships propose humbly to recommend to Her Majesty that the appeal be allowed, that the decision of the *Sudder Adawlut* be reversed, and that of the *Zillah* Court affirmed; and that the Respondents do pay the costs of the appeal to the *Sudder Adawlut* and of this appeal.

ANUNDMOYEE DOSSEE and others ... *Appellants*.

AND

POORNOO CHUNDER ROY and others ... *Respondents*.*

On appeal from the Sudder Dewanny Adawlut at Calcutta.

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Act, No.
XVI. of 1845,
amending Act
No XXIX.
of 1841
enacts, that it
is competent
to the *Sudder*
Court in the
case of the
dismissal of
an appeal for

THIS appeal was brought from an order made by a single Judge of the *Sudder Dewanny Adawlut* at *Calcutta*, dated the 19th of *September*, 1859. By a

* Present : Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

want of prosecution; upon the application of the Appellant within three months after the appeal has been dismissed, to re-admit the appeal, if the Appellant satisfies the Court, that the dismissal was " occasioned by the default of his *Vakeel*, or by unavoidable accident."

An appeal was made to the *Sudder* Court at *Calcutta*, but in consequence of the absence from illness of the Appellant's *Mookhtar*, the written reasons of appeal were not lodged within six weeks, the time prescribed by Act, No. XV., of 1853, sec. 6, and the appeal was dismissed. Upon application for re-admission of the appeal, the evidence showed,

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previous order of that Court, dated the 21st of *June*, 1850, an appeal by the Appellants then pending in that Court, against a decree of the *Zillah* Court of the Twenty-four *Pergunnahs*, was ordered to be struck off the list of pending causes, under the provisions of Act, No. XXIX. of 1841, on the ground, that the Appellants' written reasons in support of their appeal had not been filed within the period of six weeks, the time prescribed by Act, No. XV. of 1853, sec. 6, and the same Judge, by the order, dated the 19th of *September*, 1859, refused to re-admit the appeal, on an application for that purpose made by the Appellants, supported by affidavits explaining the cause of the delay in filing the reasons of appeal (a).

The facts of the case, so far as they are necessary to the question of practice raised in the appeal, were as follows :—

The Appellants were Defendants in a suit brought

(a) Act, No. XVI., of 1845, declares, that the provisions of Act, XXIX. of 1841, are inconveniently severe as regards appeals, and that it was expedient to mitigate the strictness thereof; and by sec. 1, it is enacted, that it shall be competent to the Court which shall have dismissed such appeal to re-admit the same, if the Appellant shall make application for that purpose, on the stamp prescribed for miscellaneous petitions, within three months after the appeal shall have been dismissed, and shall satisfy the Court that the dismissal was occasioned by the default of his *Vakeel*, or by unavoidable accident.

that there had been no wilful delay, and that the Appellant was in ignorance of the fact of the reasons of appeal not having been filed. Held, reversing the decree of the *Sudder* Court, that such circumstances constituted a case of "unavoidable accident," within the meaning of the Act, No. XVI of 1845, and the appeal ordered to be re-admitted on the file of pending causes.

In reversing the decree of the *Sudder* Court, the order of that Court that the costs of the application to re-admit the appeal should be paid by the appellants, was confirmed; but as the Appellants were successful in obtaining a reversal of the decree of the Court below, the costs of the appeal in England against such decree were ordered to be paid by the Respondents.

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against them by the Respondents in the Court of the *Sudder Ameen* of the Twenty-four *Pergunnahs*, and appealed to the *Sudder Dewanny Adawlut* from the decree of the *Sudder Ameen*, made on the 23rd of September, 1858. The petition of appeal was lodged on the 2nd of October, 1858.

On the 2nd of April, 1859, the Deputy-Registrar of the *Sudder Dewanny Adawlut* passed an order in that appeal, calling upon the Appellants, pursuant to the provisions of 6th section of Act, No. XV. of 1853, to prefer their grounds of appeal from the decision of the Lower Court within six weeks. The Appellants failed to do so within that time, and on the 3rd of June, 1859, the Deputy-Registrar made an order as follows:—"Although six weeks had expired from the 18th of April, the day on which the notice (pursuant to the above order of the 2nd of the same month) was affixed, yet the Appellants have not filed their grounds of objection and reasons of appeal. Wherefore, the Appellants having neglected to proceed with the case within six weeks, and it being considered liable to be struck off the file according to the provisions contained in Act, No. XXIX. of 1841, it is ordered, that the case be referred to the Judge now sitting in the miscellaneous department, for his orders to strike it off the file of the Court."

Accordingly, on the 1st of June, 1859, the matter came before Mr. *Samuells*, a Judge of the *Sudder Dewanny Adawlut*, who, ordered the case to be struck off the list of pending causes.

It appeared, that the Appellants were kept in ignorance by their *Mookhtar* of these proceedings; but as soon as they were made aware of them, they applied in the usual manner to have the appeal re-admitted,

and filed two petitions for that purpose, dated respectively the 7th of July, 1859, and the 20th of the same month. These petitions stated that the Appellants had not been guilty of any negligence, that they had retained *Vakeels* previous to the notice being affixed; and that the default was occasioned by the severe illness and absence of their *Mookhtar*, to whom was confided the conduct of the appeal; that the Appellants were altogether ignorant of such illness and absence, and to the non-filing of the reasons of appeal within the prescribed period, and they prayed that the Court would overlook the default of lapse of time, agreeably to the provisions of Act, VIII. of 1859, sec. 347, and re-admit the appeal case to the file. The Appellants filed an affidavit in support of this application, in which, after stating the information which they had then recently received of the illness and absence from *Calcutta* of their *Mookhtar* and that they were wholly ignorant and unacquainted with what had transpired concerning the appeals, until the 25th of June, 1859, when they received a letter from a third party informing them that he had heard their appeal had been struck off, deposed that they had caused inquiry to be made as to the truth of the statement of the *Mookhtar*, concerning his departure from *Calcutta* and alleged illness at *Hooghly*, and believed both the circumstances to be true; but that, even if true, it was the bounden duty of the *Mookhtar* to have given them information when he left *Calcutta* for *Hooghly*, so that they might themselves have taken steps for filing their grounds for appeal in due time; which notice, however, he wholly omitted to give; that whilst believing the probability and truth of the statements of the *Mookhtar*, they also laboured under the appre-

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hension that the *Mookhtar* might have been tampered with by the *Mookhtar* or agents of the Respondent; but whether that was so or not, the result was, that their interests had through the conduct of the *Mookhtar*, amounting either to unavoidable absence from illness, or from wilful neglect of duty, been sacrificed, and they had been debarred, without any negligence on their part, from prosecuting the appeals before the *Sudder Court*, in cases relating to disputed property of the value exceeding a *lac* of rupees.

On the 1st of *July* 1859, and pending these proceedings, Act, No. VIII. of 1859, the new Code of Civil Procedure came into operation, which by section 347, provides, that "if an appeal be dismissed for default of prosecution, the Appellant may, within thirty days from the date of the dismissal, apply to the appellate Court for the re-admission of the appeal; and if it shall be proved to the satisfaction of the Court that the Appellant was prevented, by any sufficient cause, from appearing when the appeal was called on for hearing, the Court may re-admit the appeal."

On the 30th *July*, 1859, by a proceeding held by the same Judge, it was ordered that the *Mookhtar* should file an affidavit in the matter.

An affidavit of the *Mookhtar* was filed, which stated that he acted as *Mookhtar* for the Appellants, that within ten days after the date of the decree of the *Sudder Ameen*, under the instructions of the Appellants, he caused to be lodged a memorandum of appeal in the *Zillah Court* against the decision, on their part; that after the appeals had been lodged in *Zillah Court*, he only waited for the usual *Ishtihar* to be issued from the *Sudder Court* to sign the *Vakeelutnamahs*, and had retained pleaders; that up to

the 16th April, he was in daily attendance at the *Sudder Court* for the purpose of ascertaining if such *Ishtihar* had been issued, but that none having been up to that date issued, and having received intelligence of the dangerous illness of his son, he abruptly left *Calcutta* for his family house at *Buripore*, in the District of *Hooghly*, where he arrived on the 17th of *April*, and then found that his son was under medical treatment and seriously ill, so much so that his personal care and attendance became absolutely necessary, and that he accordingly attended on him up to his death, which took place on the 30th of *April*; after that date he himself fell dangerously ill, and continued in such state, quite incapable of attending to any business, until the 17th of *June*, when he returned to *Calcutta*, and there, for the first time, learnt that the *Ishtihar*, calling on the Appellants, his employers, to file their grounds of appeal, had been issued on the 18th of *April*, and that the six weeks usually allowed for filing the reason of appeal from the date of the *Ishtihar*, had run out, and that, for such default of prosecution on the part of the representatives of *Muttyloll Seal*, deceased, and also of *Sreemutty Dossee*, the two appeals had been referred to the Judges of the *Sudder Court* for the purpose of being struck off. That, on obtaining such information, he filed a *Vakeelutnamah* in the case on the 20th of *June*, 1859, and that the two appeals were struck off the file on the following day, the 21st of *June*, 1859. That when he left *Calcutta*, on the 16th of *April*, he gave no information of his departure to the Appellants, as he fully expected to return to *Calcutta* in a few days; but that, owing to the severe and fatal illness of his son in the first instance, and his own

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personal illness in the second, he was detained at *Hooghly* until the 17th of *June*, as before stated, and whilst so absent, he failed to communicate to the Appellants, either the fact of his departure or his illness, of neither of which circumstances they had any information or knowledge, until after the appeals had been struck off the file for want of prosecution. And he admitted that it had been entirely owing to his culpable but unintentional neglect that the necessary steps were not taken for prosecution of the appeals, the duty connected with which solely and exclusively devolved on him as *Mookhtar*, and that the appellants were wholly ignorant that the appeals had been struck off, until they learnt the intelligence from other sources, which led to the discovery of his neglect and inattention to their interests, which caused his dismissal from being any longer their *Mookhtar*.

On the 16th of *September*, the hearing of this application took place before the same Judge in the *Sudder Dewanny Adawlut*, when that Judge made an order rejecting the application for the re-admission of the appeal, stating his reasons as follows:—"At the first hearing of the petition, it was contended for the Petitioners, that the application might be re-admitted, under the provisions of sec. 347 of the New Code of Procedure, on the Petitioners showing sufficient cause," to the satisfaction of the Court, for their default. But the Court were of opinion, that as the default had occurred prior to the enactment of the New Code, and was a totally different description of default from that treated of in sec. 347 of the Code, the petition must be disposed of in accordance with the provisions of the old law. The Peti-

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tioner's pleaders were accordingly called upon to satisfy the Court that the dismissal of their appeal had been occasioned either by the default of the petitioner's *Vakeel*, or by unavoidable accident; the only conditions on which, under the stringent terms of Act, No. XXIX. of 1841, and Act, No. XVI. of 1845, the Court were empowered to re-admit a case which had been dismissed for default. It was argued for the Petitioners, that the affidavits in the case were uncontradicted, and disclosed a clear case of accidental default, for which his client was in no way to blame. The sudden departure of the *Mookhtar*, without notice, his unexpected detention, and his unlooked-for illness, were all, it was said, facts which would come under the category of 'unavoidable accident;' and, on this point, the case of *Gooroo Pershad Dutt*, decided on the 7th of March, 1849, by Mr. Sconce, was quoted. On the other hand it was contended that, even if the Court did not look upon the case as one of unavoidable accident, it was, on the face of it, a default of the legal agent of the Petitioners—the person who was employed in the conduct of the suit, and who was standing at the time in the place of the *Vakeel*. A liberal construction of the law, such as, it was urged, the Court should put upon the Act, would, therefore, it was said, allow the same effect to the default of the *Mookhtar* in this case as to the default of a *Vakeel*; and the case of *Gudadhur Purshad Tewaryee v. Moosumat Soonder-hoomaree* (6 Moore's Ind. App. Cases, 201) was quoted, to show that in the case of a rule regarding default, equally stringent with Act, No. XXIX. of 1841, the Privy Council refused to construe the rule harshly to the injury of the Appellants. The

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Courts the learned Judge observed, are, always disposed to deal with cases, in which the default does not appear to be wilful, as leniently as the law will permit them; but, at the same time, they are bound to take care that any idea they may form of the hardship of a case shall not induce them to strain the law in favour of one party to the detriment of the other. To entitle him to claim re-admission for his appeal, a Petitioner must show that his case comes fairly within one of the two classes to which the law extends its indulgence, *viz.* defaults occasioned by the conduct of his *Vakeel*, or by unavoidable accident; and, in all cases, he must satisfy the Court that he himself was not to blame. Now, after a full consideration of all that has been urged for the Petitioners in this case, I do not see how they can successfully contend that the default was attributable to any other cause than their own gross negligence and lax habits of business. Hers were men who had cases in Court, involving large sums of money, who reside in the immediate neighbourhood of the Court, and are aware, or ought to be aware, of the very stringent law which enacts that any suit not prosecuted for six weeks shall be dismissed, and yet they leave everything in the hands of a single *Mookhtar*, do not send for him for months, or make a single inquiry how the case was going on. Had they placed their case when they appealed, in the hands of the respectable *Vakeels* whom they employed, with instructions to file the grounds of appeal at the proper time, and to conduct their case through all its stages, they would have been perfectly safe; but, like many of the suitors in this Court, they preferred, for reasons best known to themselves, to defer filing the

Vakeelnamah till the latest moment, and in the meantime entrusted the management of their case to a *Mookhtar*, over whom they appear to have exercised neither check nor control. This, it appears to me, is the very conduct against which the stringent provisions of Act, No. XXIX. of 1841 are levelled—the failure of suitors either to use diligence themselves in the prosecution of their suits, or to employ *Vakeels* of Court who may take the necessary steps for them. Act, No. XVI. of 1845, allows the suitor to plead the default of his *Vakeel*, but of no other person. The *Mookhtar* is not a legal agent, recognized by the law, and cannot claim, under any circumstances, to stand in the shoes of the *Vakeel*. He is merely the private servant of the suitor; and the default of the *Mookhtar* is, in the eye of the law, the default of the suitor himself. The only plea which the law allows a party to a suit to put forward in exculpation of his own default, is that of unavoidable accident; but, as I have already intimated, I can see nothing of the kind here. It was not accident which caused the Petitioners to leave their *Mookhtar* to deal with the case as he thought proper, without taking the most ordinary precautions in the matter themselves; and it was not accident which led to the *Mookhtar's* absenting himself without notice, or to his masters permitting his absence to pass unobserved. It was nothing, on the part of both masters and servant, but extreme negligence and unbusiness-like habits. The cases which have been quoted in support of the Petitioners' application are quite irrelevant. In that of *Governpershad Dutt*, where the Appellant, residing in the *Mofussil*, despatched a servant with a *Mookhtar-namah*, and the papers of the case to Calcutta,

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that he might appoint a *Vakeel*, and the *Mookhtar* fell ill on the road, the Court, after taking evidence, held it to be a case of unavoidable accident, for which the Appellant was not to blame, and replaced his suit on the file. The case was precisely as if the Appellant himself, journeying to *Calcutta* to appeal, had been struck down by sudden illness. It is scarcely necessary to point out how very widely that case differs from the present, where there is apparent, a long course of negligence, and where the Petitioners, had they used ordinary vigilance, would have ascertained the absence of their *Mookhtar* in time to take the necessary steps for prosecuting the appeal themselves. The case of *Gudadhur Purshad Tewarree v. Moosumat Soonderkoomaree*; and the case of *Seto Lutchemeechund v. Scto Zoramur Mull* (6 Moore's Ind. App. Cases, 204), rather make against the Petitioners than otherwise, as they show that the Privy Council would not have relaxed the rule referred to in these decisions, except under the very special circumstances which the cases disclose. The dismissal of the Petitioners' appeal, then, being neither occasioned by the default of their *Vakeel*, not by unavoidable accident, but purely by their own inexcusable negligence, the application is necessarily rejected, with costs."

The present appeal was from this order. •


Mr. *Forsyth* Q.C., and Mr. *Leith*, for the Appellants.

As the affidavit of the *Mookhtar* sufficiently explained the cause of the delay in filing the reasons of appeal within the period of six weeks, the limit prescribed by the Act, No. XV. of 1853, sec. 6, the refusal of

the Judge to re-admit the appeal to the list of pending causes upon a mere question of procedure, on the ground that the default must be occasioned by the "*Vakeel*," or by "unavoidable accident," was erroneous and cannot be upheld. The alleged default of the Appellants on account of which their appeal was dismissed, was caused by "unavoidable accident" within the meaning of the Act, No. XVI. of 1845. According to the equitable construction of that Act, a party who suffers from the default of his *Mookhtar*, under such circumstances as existed in this case, is entitled to the same indulgence as if the negligence had been occasioned through the "default of his *Vakeel*," and we submit, that the ruling of the *Sudder* Judge was wrong in holding that the Act did not apply to the default of a *Mookhtar*. Again, the Judge was wrong in his judgment, in holding that the provisions of sec. 347, of the Act, No. VIII. of 1859, which contains the new procedure of the Court and came into operation on the 1st of *July*, 1859, were not applicable to the present case.

Mr. *Andrew*, for the Respondents.

The decision of the *Sudder* Judge upon the question now raised, is in accordance with the law as it stood at the time of the Appellants' default. They failed to file their grounds of appeal within the prescribed time, and that default was solely attributable to their own gross negligence. It cannot be successfully urged, that the evidence adduced by the Court below, with a view of inducing that Court to re-admit the appeal, disclosed sufficient grounds to entitle them to the indulgence they asked. The Act, No. XIV. of

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1845, enumerates two instances only where relief can be given; first, default of the *Vakeel*, and, secondly, unavoidable accident, neither of which instances can be construed to apply to the present case.

The Lord Justice KNIGHT BRUCE :

The evidence shows that this is a case of "unavoidable accident" and is within the provisions of the 1st sec. of the Act, No. XVI. of 1845.. The decree of the Court below, therefore, cannot stand; and we shall humbly advise Her Majesty to reverse it. As to the costs of the application in the Court below, their Lordships are of opinion, that the Court below was right in ordering them to be paid by the Appellants, but the costs of the appeal must be paid by the Respondents (a).

(a) In the case of *Sreemutt, Dossee Poornoo v. Chunder Roy* and others, the circumstances of which were exactly similar with the above case, and which was heard by the Judicial Committee on the same day, a similar order was made, re-admitting the appeal.

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... *Appellant*.

AND

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and others ... }*Respondents.*³*On appeal from the Sudder Dewanny Adawlut at Calcutta.*Heard *ex parte*.

THIS was a suit brought by the Appellant against the Respondent, *Baboo Loll Bahadoor Singh*, and *Baboo Bhowance Pertaub Singh*, for himself, as guardian of *Baboo Fobraj Singh*, his minor son. The chief object of the suit was to obtain a declaration of the Court on the construction and effect to be

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Construction of an *Ithar-namah*, or deed of agreement and partition, of an ancestral estate, among several brothers: Held that the terms of the deed were not restrictive upon the power of each brother, to alienate his separate share.

A, one of

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

the brothers, had his share registered on the Collector's Books as owner, and by deed of sale conveyed such share to his daughter, who was also his heir. The Collector, upon the objection of one of A's brothers, (who denied A's right to alienate, on the ground that it was ancestral property,) refused to register the daughter's name as proprietor. Held, that the Collector was bound by *Ben. Reg. VII.* of 1800, sec. 21, to register her name as purchaser, but that such mutation of name was to be without prejudice to the question of the right of succession.

It is beyond the power of the Court to make a declaration in a decree, upon a point not recorded in the issues, as required by *Ben. Reg. XXVI.* sec. 10, of 1814.

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given to an *Ikrarnamah*, or instrument of agreement and partition, executed by four brothers named *Loll Bahadoor Singh*, *Bhowanee Pertaub Singh*, *Run Bahadoor Singh*, and *Odey Pertaub Singh*, and raised the question of the power of *Baboo Loll Bahadoor Singh* to alienate his share of the ancestral property which was formerly jointly held by himself and brothers. The suit was instituted at the instance of the Government Commissioner of Revenue, who refused, without a decision of the Civil Court, as to the construction to be put on the *Ikrarnamah*, to affirm an order of the Collector, which directed that the name of the Appellant as purchaser should be substituted in the Collector's books for that of *Baboo Loll Bahadoor Singh*, the vendor of the *mousahs*, or villages, the subject of the suit.

The facts were these :

The above-named four brothers were Hindoos, and in joint possession as co-sharers of certain landed property, consisting of numerous *mouzahs* in *Zillahs Behar* and *Shahabad*, and being desirous of effecting a partition and division of the same among themselves, executed, on the 22nd of October, 1845, an *Ikrarnamah*, which was duly registered.

This *Ikrarnamah* was in these terms :- "Whereas, it is mutually necessary for us to divide by lot, villages, properties and revenues and *malikana* of the *minghee* villages, or *Pergunnah Ceris* and *Kotumba*, in *Zillah Behar*, and of the settled villages and *malikana* of the *minahee* villages of *Pergunnah Havellee Ruhtans* of *Zillah Shahabad*, and of the *Mocurrery* villages in *Pergunnah Pullamon*, and of the lands *Gurbagh* in *Moorarpoor*, in *Pergunnah Gyah*, and of the debts of

Mahajuns and the *surpeshgee* of *Tikadars*, etc., for this purpose a *Punchayet* has been appointed, viz. *Sheemunth Ram Chunder Bhartee*, *Baboo Tejnarayn Singh*, *Baboo Bishen Nath Singh*, and *Baboo Daad Bahadoor Singh*, and we have filed an *Ikrarnamah punchayuttee* (arbitration bond) before the *Punchayet*, under our signature; but on account of the non-fulfilment of the conditions of said *Ikrarnamah*, the said members of the *Punchayet* have declined to act. Now, with our voluntary and free will, in the presence of *Lala Dabee Purshaud*, our *Mookhtar*, we have submitted a *hyut-bundee* (specification) of the villages and of the *malguzary*, after giving a deduction of *mousahs Tekrah* and *Bhorosah* and *Sardusee*, *uslee* and *rujokee* and *muhdowah*, *uslee* with *dakhillee* of *Pergunnah Kotumba* in *Zillah Behar*, and of *Mouzahs Sumhona* and *Koremaha*, *Pergunnah Havellee Ruhtans* in *Zillah Shahabad*, all of which belong rightfully to *Baboo Run Buhadoor Singh*, that is to say, in right of primogeniture, and the debts of *Mahajuns*, *surpeshgee*, of *Tikadars*, etc., and each sharer has obtained the *hyut-bundee*, and is in possession of the share accordingly. Under these circumstances, there is no dispute or contention existing with reference to the partitioned villages, and the debts of *Mahajuns*, etc. The *malguzary* of *Mousah Duldhar* and *mouzah Daoodpoor*, appertaining to *Havellee Ruhtans*, according to the *ticca* writing of the *Tikadars* down to the *Fuslee* year 1255, is collected, and each sharer is to take an equal share of it. From 1256, we shall continue to make collections of the *malguzary* of the villages, as mentioned in the *hyut-bundee*. We, therefore, declare and give in writing, that in case of necessity, we four brothers

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are competent, in order to liquidate expenses, debts of *malguzary*, debts of *Mahajuns*, etc., in case of our having no means at hand, to make alienations in the best way we think proper of shares of our villages, by deed of irreversible *kabala*, *bybil wuffa*, mortgage, *ijarah* and *surpeshgee*, *bhurna*, etc. We shall continue to pay debts of *Mahajuns*, *surpeshgee*, of *Tikadars*, etc., in proportion assigned in the *hyut-bundee* to each sharer, and whatever besides becomes payable during the period of coparcenary. We, nor our heirs, shall make any objection in respect of the deed of *bhurna*, *burmahurree*, *tomusooks*, *bybil wuffa*, *ijarah*, *tunkhahee chittees*, and receipts, bearing date previous to this *Ikrarnamah*. Cases which are pending or will be brought in the Civil Courts, *Foujdary* Courts, Collectorate, and other Lower Courts of the *Zillah* and in the *Sudder*, during the period of coparcenary, the expenses of the prosecution and defence thereof are chargeable to all four brothers; should any of us, declarant or our heirs, swerve from these conditions, in that case the said objection will become void."

After the execution of the *Ikrarnamah* the brothers individually exercised acts of ownership over their several separated shares, some of them selling the *mousahs* assigned to them.

On the 16th September, 1848, *Baboo Loll Bahadur Singh* having no male issue, sold the *mousahs* in question in this suit, constituting his share of the joint estate, for the sum of Rs. 75,501, to his daughter, the Appellant, and at the same time executed a deed of sale, which was registered in the office of the Registrar of deeds of *Zilla Behar*.

The ordinary petition was presented to the Collector by the Appellant and the vendor, stating the

purchase, and deed aforesaid, the payment of the purchase-money, and the possession of the Appellant, and praying that her name might be recorded in the Collectorate in place of that of the vendor on his assent at the time given. *Bhowanee Purtaub Singh*, one of the vendor's brothers, thereupon filed a petition of objections, on behalf of himself and his minor son, alleging that *Baboo Loll Bahadoor Singh* had no power to alienate by sale ancestral property in favour of the Appellant during the lives of the Petitioner and his son, and praying that the name of the vendee might not be recorded. Afterwards a second petition was filed by the same party, referring to the terms of the *Ikrarnamah*, and contending that only conditional sales—namely, for the liquidation of debts and Government revenue, were permitted under that instrument, and that, therefore, *Baboo Loll Bahadoor Singh* was not competent to make any alienation. The vendor filed a petition by way of answer, in which he stated, that he and his brothers were separate, and that their property had been divided among them, and that sales had been made by them severally of *mousahs* out of their respective shares, and that the names of the purchasers had been duly recorded in the Collectorate.

The hearing of the petitions took place before the Assistant Collector, when that Officer ordered as follows:—"Whereas it appears from a copy of the *Ikrarnamah* filed by the *Mookhtar* of the objector that it has reference only to the fact that a sale is allowable for liquidation of debt under decrees, etc., and in the bill of sale adduced by the Petitioner there is no mention of 'necessity' for making the sale. Under these circumstances, the vendor is not competent to

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make any alienation. Ordered, therefore, that this case be struck off the file."

The Appellant appealed from this decision to the Collector, and on the 23rd of *December*, 1850, the hearing of the appeal took place, when the Collector, referring to the terms of the *Ikrarnamah*, declared the competency of the vendor to alienate the *mouzahs* sold, reversed the decision of the Assistant Collector, and ordered, to the effect, that the name of the vendor should be struck out from the Government records, and the name of this Appellant as the purchaser should be substituted. The objector being dissatisfied with the order, filed a petition of appeal in the Court of the Commissioner against this decision. The hearing of the appeal took place before the Commissioner on the 3rd of *June*, 1851, when by a proceeding of that date he declared, that the mutation of names was not valid; and that, although the Collector in his proceeding had declared the competency of the vendor to alienate the share sold under the *Ikrarnamah*, and ordered that the name of the female purchaser might be registered, and that of the vendor struck off, yet that a decision on the terms of the *Ikrarnamah* rested with the Civil Courts. Hence, in the opinion of that Court, the Collector's order could not be admitted or confirmed, and it was ordered by the Commissioner that the Collector's order, dated the 23rd of *December*, 1850, be reversed.

In consequence of this decision of the Commissioner, the Appellant brought the suit from which the present appeal arose against *Baboo Loll Bahadoor Singh* and *Bhowanee Partaub Singh*, and his minor son, *Jobraj Singh*. In the plaint the Appellant stated

that the *mouza*hs were held by the Defendant, *Baboo Loll Bahadoor Singh* as his own absolute property under the partition and division aforesaid, and the *Ikrarnamah* above mentioned; that he sold the same under the registered deed of sale, and for the consideration aforesaid, to the Appellant, who was put into possession, and then still continued in possession thereof. The plaint further stated the proceedings before the Assistant Collector, the Collector, and Commissioner, submitting that the order of the Commissioner was opposed to the provisions of sec. 21, of *Ben. Reg.* VIII. of 1800, and precedent, No. 4, cited in the Circular Order of the *Sudder Board of Revenue*, dated 25th of *March*, 1851; and prayed that orders might be passed by the Court to have the Appellant's name recorded in the Collectorate in place of that of the vendor, in respect of the *mouza*hs.

The answer of the Defendant, *Bhowanee Purtaub Singh*, after objecting that certain *mouza*hs of *Zillah Shahabad* were left out of the plaint, and the omission of mention of the price of each *mouza*h, insisted that the record of name was intended for the person in possession, but that the present Appellant was never in possession of the *mouza*hs, and never paid the consideration money. The answer also stated, that the *mouza*hs were acquired by the common ancestor of the four brothers; and it submitted, whether by law an ancestor had the power directly or indirectly to make alienations in face of the real successor, and to his deprivation. It then stated, that of the brothers only one, viz. the Defendant, had male issue, and insisted that the *Ikrarnamah* only permitted a sale to pay revenue or other debt of the sharer.

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The answer of the Defendant, *Baboo Loll Bahadoor Singh*, supported generally the statements in the plaint and expressed assent to the mutation of name prayed for therein, praying that he might be dismissed the suit, with costs, having been made unnecessarily a party.

The replication stated, in respect to the *Ikrar-namah* referred to in *Bhowanee Pertaub Singh's* answer, that it nowhere contained a condition that a brother was not competent to alienate property mentioned in that instrument or otherwise, when he had brothers or nephews alive, but that rather the whole tenor of the deed was, that such sharer was competent to make alienation of his share.

The pleadings having been closed, the usual proceeding by the Principal *Sudder Ameen*, under sec. 10, *Ben. Reg. XXVI.* of 1814, took place, when the issues to be tried in the suit were recorded as follows:—Pleas in bar in admission of suit.—First, is this suit admissible or not, according to Circular Orders of the 11th of *January*, 1839, and the 30th of *September*, 1847, as certain *mouzahs* of *Zillah Shahabad* have been left out from the plaint; and also whether omission of the mention of the price of each *mouzah* is or is not in contravention of sec. 3, *Reg. IV.* of 1793, and reports of regular cases decided on the 12th of *March*, 1850, and 13th and 18th *April* of that year? Second, is the suit of Plaintiff, claiming the record of her name, although out of possession of the purchased property, without first suing for possession, admissible or not? Facts arising which require to be determined in accordance with clause 2, sec. 10, *Reg. XXVI.* of 1814. The first point relative to fact to be determined, which Plaintiff may adduce and the Defendant

deny. First. It is to be seen first whether the bill of sale dated 1st of *Assin* of the *Fuslee* year 1256, is correct or not in conformity of Regulation, and whether the Plaintiff is in possession of the purchased property or not; and what is the condition of the *Ikrarnamah*; and is the vendor competent to sell or not; and is the Plaintiff rightfully entitled to get her name recorded in the Collectorate or not, in reversal of the *roobakaree* of the Commissioner? Is the intent of the Circular Order of the *Sudder* Board, dated 25th of *March*, 1851, in bar of the mutation or not? The second point relative to fact to be determined, which Defendant may adduce and the Plaintiff deny. "It is to be seen first what the form of sale and purchase is, and what are the terms of the *Ikrarnamah*, and is Plaintiff in possession of the same or not, and whether the vendor is competent to make alienation of the property in dispute or not, and whether *Baboo Loll Bahadoor Singh*, one of the Defendants, ought to be exonerated from this claim."

Evidence was adduced by both parties under these issues, and witnesses were examined on behalf of the Appellant, who proved the sale and purchase, and her actual possession thereunder. There were also witnesses examined on behalf of the Defendant, *Bhowanee Purfaub Singh*, in contradiction to the witnesses of the Appellant, to prove that she was not in possession. It was further proved in the course of the examination of the Defendant's witnesses, that the four brothers separated, and that a decision was made among them, and that the *mousahs* in question fell to the lot of *Baboo Loll Bahadoor Singh*.

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The hearing of the suit took place before the Principal *Sudder Ameen* (*Moulvee Sayyad, Mahamed Rafeeq Khan Bahadoor*), in the Court of the *Zillah of Behar*, on the 20th of *August* 1853, when he made a decree in favour of the Appellant, in the following terms:—"In this case, the claim of the Plaintiff is as stated above, and that the answer of *Baboo Loll Bahadoor Singh*, vendor, is, in support of the plaint of the Plaintiff, and prays his own exoneration from the claim; and that the answer of *Bhowanee Purtaub Singh* is to the effect that the plaint is irregular, by reason of omitting the *mousahs* in *Zillah Shahabad*, mentioned in the bill of sale: that the Plaintiff is not in possession; that no mention is made a price; that the vendor is not competent to make alienation of the property claimed under the deed of partition, and that the vendor has no male issue, but nephews, as stated expressly in the answer. But no irregularity is found in the plaint, as the defect is cured by supply of supplementary stamps. This action is merely to get her name recorded in the Collectorate. It became necessary, therefore, to try this point only, viz., whether or no the vendor has the right to sell the property in dispute, and is, or is not, Plaintiff rightfully entitled to get her name recorded in the Collectorate, and to ascertain who is the person in possession of the property in dispute. The decision thereupon is this:—This case was instituted to effect the record of names in place of others to be expunged. The vendor admits the sale, and the opposing Defendant also does not deny the fact of the right of the vendor, but he declares that the vendor is in possession,

which is not established, because, by the testimony of witnesses on the part of the female Plaintiff, her possession is proved. From copies of bills of sale, and *roobakarree* of mutations, and documents filed by the Plaintiff, it is evident that *Baboo Run Bahadoor Singh*, and *Baboo Odey Purtaub Singh*, and the opposing Defendant, have sold their *mouzahs*, mentioned in the deed of partition, in proportion of shares mentioned in the papers aforesaid, and the mutation of names has been effected, and not one of them has protested against it. Under these circumstances, there appears no ground why a sale of the property in dispute should not be effected. The passage, that in case of necessity, for expenses and payment of revenue, and debt of *Mahajuns*, etc., and by reason of their having no cash with themselves, the four brothers are competent, in the best way they are able, to raise money by sale absolutely, and by *bybil-wuffa*, and mortgage, and by leasing out and by usufructuary *peshgee*, etc, of the villages of their own shares, is mentioned in the deed of partition, dated the 6th of *Kartick*, 1252, *Fuslee*; and is, in my opinion, no bar to the sale made, but, on the contrary, the clause fortifies the sale. If such were not the case, then how did these people sell as well as the opposing Defendant? If this sentence, namely, 'If sale is made without necessity, it is void, and in case of necessity, it should be incumbent to prove the validity of the same,' were in the deed of partition; in that case there may have been something. Such, however, is not the case, nor is the word 'necessity' used in the sale of those vendors. The bare allegation of the witnesses of the Defendant, in respect of possession of the vendor, is not sufficient in

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this case. His *Thicadars* have also deposed to the possession of the vendee. Under these circumstances it is ordered, that this case be decreed the Plaintiff."

The Defendant, *Bhowanee Purtaub Singh*, appealed from this decree of the *Sudder Dewanny Adawlut*.

The hearing of the appeal took place before the Judges of that Court, consisting of Messrs. *Trevor, Samuells, and Money on the* 18th of April, 1857, when the Court decreed as follows:—
"On the merits it was argued by the Appellant that the clause of the deed of partition was restrictive, and that the Plaintiff's father was only empowered to sell under circumstances of urgent necessity, which he was bound to prove. The sale, moreover, it was contended, was manifestly fictitious, no proof of the payment of the consideration-money, which the deed alleged, having been given, and the whole circumstances of the case showing the transfer of the property to have been merely nominal. For the Respondent, it was contended, that these were not pleas which the Appellant, who had no immediate interest in the property, was competent to raise, that the Plaintiff's suit was merely for registration, to which she was entitled, on the acknowledgment of the transfer by the vendor, and proof of possession of the estate, which, it was maintained, she had given; that she had not sued to establish her title, and that under the provisions of the registration law, *Ben. Reg. VIII. 1800*, it was unnecessary for her to do so. We entertain no doubt of the Defendant's competence to raise the question of the *bona fides* of the sale in this action. His rights as the nearest, or one of the nearest heirs who can

take absolutely after the death of *Baboo Loll Bahadoor Singh*, are clearly attacked by the sale, and the recognition of her title as purchaser and absolute proprietor under the purchase, which the Plaintiff seeks to obtain, would altogether destroy the reversionary interest which, in the absence of a sale, the Defendant possesses in the property. We are not of opinion, that the terms of the deed of partition are not restrictive to the extent of compelling the shareholder, who may part with his share, to prove the necessity under which he acted. On the contrary, while recognizing the abstract impropriety of parting with ancestral property, except under the pressure of necessity, the deed clearly constitutes each shareholder the judge of that necessity in his own particular case; and the particular clause quoted has, we think, been inserted to obviate any objection which might otherwise have arisen under the *Mithila* law, to sales effected by any one of the shareholders without the consent of his brethren. But, we see no evidence in the case before us, that any *bonâ fide* sale has taken place; nor do we consider that the Plaintiff has established the material averments on this head, which her plaint contains. Her averments are, that her father, being in want of money, sold to her the whole of his landed property for the sum of Rs. 75,501, and put the Plaintiff in possession on receiving the full amount of the consideration money. Now, no evidence as to the payment of this large sum is tendered. Only one witness to the deed of sale is examined, and he expressly says, that no consideration passed in his presence, when the deed was executed. It is not even suggested from what source the daughter of the vendor, who is represented as being himself in want

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of money, could have obtained the necessary funds, nor is any proof furnished that the vendor was in want. The evidence as to the Plaintiff's possession of the property goes merely to show that notice of the transfer was given to the tenants, and that they paid their rents in to her account; but this is quite consistent with the supposition of the transfer being a *benamee* one, and it is not shown that the money thus received was applied separately for the daughter's benefit, or indeed that she had any establishment distinct from that of her father. Under these circumstances, we cannot but regard the sale to the Plaintiff, and her possession under that sale, as alike fictitious, and we accordingly reverse the decision of the Principal *Sudder Ameen*, and decree the appeal with costs.

The present appeal was from this decree.

As the Respondents did not appear, the case was heard *ex parte*.

The Solicitor-General (Sir R. Palmer) and Mr. Leith, for the Appellant.

At the time of the alienation, *Baboo Loll Bahadoor Singh* was separate from his brothers, having, under the deed of partition of the family property, held the *mouzas* afterwards sold by him to the Appellant, his daughter, as his own separate and divided share; and, therefore, he was competent by Hindoo law, to make sale or gift of the *mouzas*, as his own absolute and exclusive property; and the Appellant's name, as proprietor, ought to have been registered by the Collector, pursuant to *Ben. Reg. VIII. of 1800. sec. 21*, as the rights of succession are not changed by mutation of names on the registry. With respect to the title to

the *mousahs*, on the death of the *Baboo Loll Bahadoor Singh*, intestate and without male issue, the Appellant, as his daughter, and not his nephews, would have succeeded to the *mousahs* as heir-at-law according to Hindoo law, supposing that the sale of them had not been made. Even if *Baboo Loll Bahadoor Singh* and his brothers and nephews had remained members of a joint and undivided Hindoo family, which was not the case, and that no partition of their family property had taken place, he, having no male issue, would have been competent, according to Hindoo law and custom, to alienate his own undivided share. It cannot be maintained, therefore, that the provisions of the *Ikrarnamah* executed by the brothers, limited or restricted the power of *Baboo Loll Bahadoor Singh*, as a divided member of a Hindoo family to alienate any portion of the separate share vested in him under the partition and division of the family property effected by himself and brothers. Lastly, we submit that the ground on which the suit was decided against the Appellant in the *Sudder* Court was not open between the parties, having regard to the issues recorded by the *Zillah* Judge under cl. 3, sec. 10, *Ben. Reg. XXVI.* of 1814.

The Lord Justice TURNER :

Their Lordships have fully considered this case. They do not think it would be right for them to order this deed to be put upon the register in any mode that would give a colour of the opinion of their Lordships as to the validity of the deed, considered without reference to the clauses contained in the partition deed ; but, with reference to the clauses in the partition deed, their Lordships agree with

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the *Zillah* and the *Sudder* Courts in the opinion that those clauses did not prevent *Baboo Loll Bahadoor Singh* from alienating the property in any mode he might think fit.

Their Lordships cannot agree with the decision of the *Zillah* Court, which puts the case upon the footing of a purchase, and registration as a purchase, nor can they agree with the conclusion of the *Sudder Dewanny Adawlut*, which Court seems to have entered into a matter not very distinctly in issue in the suit, and as to which there had been no points recorded.

It appears therefore, to their Lordships, that the proper course to take in this case is, to reverse the decree of the *Sudder Dewanny Adawlut*, and also the decree of the *Zillah* Court, and to declare, that by the clauses contained in the deed of partition, *Baboo Loll Bahadoor Singh* was entitled to alienate the property in question, and that the Appellant is entitled to have her name put upon the register, but to provide that the order is to be without prejudice to any other question of title or right that may be raised against the Appellant, or her representatives, in any other suit, or proceeding.

Their Lordships do not think this a case to give any costs.

RAJAH NURSING DEB

... Appellant,

AND

ROY KOYLASNATH and others

Respondents.*

*On appeal from the Sudder Dewanny Adawlut at
Calcutta.*

THE question in this appeal turned upon the construction of a *sunnud*, in the nature of a deed of maintenance, dated the 8th of August, 1799, by which certain villages and lands were granted by Chytun Singh, the Rajah in possession, to Joy Singh Deb, to hold "possession of the villages, and lands, &c., and support his Lowahokans and Motalokans (dependants and relations) from generation to generation," and the point raised was, whether Joy Singh Deb had any power under this deed to alienate the property beyond the term of his own life; or whether, notwithstanding his alienation, the villages and lands did not vest in his descendants "from generation to generation," they maintaining such

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

"Lowahokans and Motalokans" (dependants and relations). A's heir afterwards alienated a part of the estate for a valuable consideration. Held, first, in the absence of evidence of any class of persons answering the description of "Lowahokans and Motalokans" (which might have created a trust), that A. took an absolute estate in the lands assigned to him; and

Secondly, that the limitation in the *sunnud* "from generation to generation" did not create such an estate as to operate as a bar to alienation by sale.

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The Zemindar in possession by a *sunnud* conveyed to A., as the head of a branch of the grantor's family, an estate, part of the Zemindary, in lieu of maintenance to which A. was entitled out of the Zemindary; "to hold and enjoy possession, from generation to generation," subject to an allowance for maintenance to a certain class of the family described as

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dependants and relations out of profits of the estate so conveyed to the grantee.

The circumstances under which the deed was executed were as follow :—

The villages and lands were formerly part of the *Raj of Bissempore*, of which the grantor, *Chytun Singh*, and his cousin, *Radha Damoodhur Singh* (descendants of a common ancestor named *Gopaul Singh*, the former *Zemindar*), were in the year 1771 jointly possessed.

Some time after *Gopaul Singh's* death, *Chytun Singh* instituted a suit against *Radha Damoodhur Singh*, for the purpose of having it declared that, in accordance with a custom which prevailed in the family *Chytun Singh*, as nearest heir, was alone entitled to the *Zemindary*. This claim was recognized by the Governor-General and the Council (who at that time had jurisdiction on appeal), and who, by their order dated the 14th of *April*, 1780, so decreed; but they also, by a subsequent order dated the 21st of *September*, 1781, assigned one-half share of what is called *Bhutterjant* land to *Radha Damoodhur Singh* for his maintenance.

Radha Damoodhur Singh died, leaving his son, *Bahadoor Singh*, his heir, who instituted a suit claiming a share in the *Zemindary*, which, on the 22nd of *January*, 1795, resulted in a decision of the *Sudder Dewanny Adawlut*, confirming the order of the Governor-General, dated the 14th of *April*, 1780, the Court declaring that *Bahadoor Singh* and his connections were entitled to maintenance at *Chytun Singh's* hands, for which, if kept back, it was competent for him to maintain a suit to recover. *Bahadoor Singh* subsequently died, leaving his son and heir, *Foy Singh Deb*, and also leaving a half-brother of *Foy Singh*, named *Rughoonath Singh*; and the provision for

maintenance of *Joy Singh* and his branch of the family not being regarded by *Chytun Singh*, a suit was instituted, and *Joy Singh Deb* obtained a decree against *Chytun Singh*, which decree fixed the yearly maintenance to be paid by him to *Joy Singh Deb*, and the other heirs and descendants of *Radha Damoodhur Singh*, at Rs. 4,200.

Instead, however, of allowing this sum to remain as a permanent charge, *Chytun Singh* determined to appropriate specific villages and lands; and he assigned Rs. 1,500, as the provision for the maintenance of *Rughoonath Singh* and the branch of the family of which he was the head; and, to secure it, *Chytun Singh*, by a *Sunnud*, assigned to *Rughoonath Singh* certain lands in lieu of the Rs. 1,500. In like manner, in order to provide permanently for the maintenance of *Joy Singh Deb*, and the branch of the family of which he was the head, and who were entitled to maintenance under the decree, *Chytun Singh*, on the 13th of *Sraban*, 1206 B. S. (1799), assigned to *Joy Singh Deb* the villages and lands which were the subject of the present suit, and the annual income from which was about Rs. 2,000.

The *sunnud* by which these villages were assigned was in the following terms:—"To the seat of all happiness, my grandson, *Sree Sree Rajah Joy Singh Deb*, I do hereby execute a *sunnud Khooro Poos'* (deed of maintenance), to the following effect:—The *Zemindary* of *Pergunnah Bistopore*, &c., were jointly of the late *Rajah Radha Damoodhur Singh*, your grandfather, and of me. Afterwards, disputes having arisen with the late *Rajah Radha Damoodhur Singh*, your grandfather, and the late *Rajah Bahadoor Singh Deb*, your father, regarding the *Zemindary*, the *Zemindary* of the whole *Pergunnah*

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aforesaid has been decreed to me; but, in the said decree, it is ordered that I shall have to grant 'maintenance out of the *Zemindary* to the 'Lowahokans'—i. e., members of the family of *Rajah Damoodhur Singh*, and to the *Motalokans*'—i. e., the dependants of *Rajah Bahadoor Singh*. For this, according to the order of the *Sudder Dewanny Adawlut*, it being necessary to allow maintenance to those 'Lowahokans,' and 'Motalokans' from the *Zemindary* of the *Pergunnah* aforesaid, the sum of Rs. 3,500 is fixed. Out of this, to *Sree Sree Rughoonath Singh* and others, agreeable to separate *Ismanuveesee* (list), a separate *sunnud* of this kind has been granted for 1,500 *beegahs* of land, in lieu of Rs. 1,500. Deducting that in lieu of Rs. 12,000 for your maintenance, I do give unto you the entire *mouzahs* and lands, as per schedule of allotment at foot. Holding and possessing the *mouzahs* and lands, &c., and giving maintenance to the 'Lowahokans' and *Motalokans* on your side, continue to hold and enjoy possession at ease, uninterruptedly, from generation to generation. Besides this, whoever has got a decree for the *Dewutter* shall hold and keep in possession separately of it."

Joy Singh Deb obtained possession of the lands mentioned in the *sunnud*, and continued in possession of them, and out of the income derived therefrom maintained his family down to the year 1832, when, in payment of certain debts and a judgment, he executed a deed of conveyance, by way of absolute sale of the lands to one of the Respondents, named *Gunga Narain Roy*, who was thereupon put in possession.

Joy Singh Deb died in the year 1846, leaving the Appellant's father, *Cheytt Singh*, his heir and legal representative; *Cheytt Singh* claimed the villages and lands, on the ground that they were not alienable; and

ultimately, on the 8th of *October*, 1852, he filed a plaint in the Court of the Principal *Sudder Ameen* of the *Zillah* Court of *West Burdwan*, against *Gunga Narain*, and *Koylasnath Roy*, then in possession, praying to be put in possession of the lands, alleging that the lands assigned by *Chytun Singh* agreeably to the order of the Court for the maintenance of the relations and dependants, were inalienable, and could not be transferred by sale or gift.

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Gunga Narain Roy and *Koylasnath Roy* by their joint answer, set up the sale by *Joy Singh Deb* to *Gunga Narain Roy* as an absolute and valid sale, and also pleaded the *Ben. Reg.* of limitations, sec. 14, and III. of 1793, on the ground that there had been more than twenty years' possession of the land in question under *Gunga Narain Roy* before the institution of the suit.

The cause came on for hearing before the Principal *Sudder Ameen* (*Sree Gobind Chunder Bidyartno*), upon the 24th of *November*, 1856, who decreed in favour of the Appellant (who had in the meantime succeeded his father), holding that *Joy Singh Deb* could not alienate any part of the lands to the injury of the next heirs in reversion, or charge, except so far as his own life interest extended; and, further, holding that the law of limitation did not affect the Appellant's claim, inasmuch as he had brought his suit within six years from the date of the death of *Joy Singh Deb*, on which date he considered his right of action first accrued.

The Respondents appealed to *Sudder Dewanny Adawlut*, at *Calcutta*; and the hearing of the appeal took place before Messrs. *Raikes*, *Patton*, and *Torrens*, three of the Judges of that Court. These Judges pro-

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nounced their decree on the 29th of *April*, 1858, reversing the decree of the Principal *Sudder Ameen*, and dismissing the suit of the Appellant. The decree was as follows: "In order to determine the point of limitation raised in this case, it is necessary first to ascertain and decide whether the Lower Court has rightly maintained the inalienable nature of the grant, as pleaded by the Plaintiff; as, if the contrary be established, we consider both the evidence on record and the judgment of the Lower Court on the long possession of *Gunga Narain Roy* under the registered *Kubala* of 1239, fully entitle the Defendants to demand the dismissal of this claim as barred by lapse of time, without the Court expressing any further opinion as to the technical informality of the deed under which that possession was originally required. We are told that the *Zemindary* of *Bissenpore* was held jointly at one time by *Chytun Singh* and his younger brother, but that, disputes occurring, *Chytun Singh* sued to hold the estate singly, in accordance with family custom, and his claim was conceded, with the proviso that he should provide for maintenance of his younger brother. An action was then commenced by *Bahadoor Singh* for their maintenance, and the Court decreed that it should be fixed at Rs. 4,200, yearly. When this decree was passed it would appear that the recipients were *Joy Singh Deb* and *Rughoonath Singh*, the sons of *Bahadoor Singh*; and on the 13th *Sawun*, 1106 B.S., *Chytun Singh* executed as *sunnud*, assigning to *Joy Singh Deb* certain lands and villages in lieu of the maintenance allowance fixed by the decree. This *sunnud* recites that a separate assignment had been made to *Rughoonath Singh*, and others, in discharge of the same decree, at the computed

value of Rs. 4,500 yearly income, and that the grant to *Joy Singh Deb* was for the yearly value of Rs. 2,000. Thus we see that in lieu of the yearly allowance, fixed by the Court at Rs. 4,200, for the maintenance of *Bahadoor Singh's* relations and dependants, lands and villages were assigned by *Chytun Singh*, and the computed value of the allowance reduced by the recipients to Rs. 3,500, per annum. This further purport of the deed has been held by the Lower Court to have conveyed to *Joy Singh Deb* the lands mentioned therein as a maintenance for himself and family, to be enjoyed by them generation after generation, and to be inalienable by any member of the family. The question which has been raised and argued before us is whether the grant purports to be a grant to the family generally, or to *Joy Singh Deb* individually, leaving him to provide for their maintenance from the proceeds of the property, and releasing *Chytun Singh* from all responsibility on that account. We have no hesitation in holding that this last is the proper interpretation to put upon the deed. The deed was without doubt a compromise under the decree, and, in full discharge of it, *Joy Singh Deb*, as head and representative of his branch of the family, was the recipient of the allowance settled upon them by the decree, and in the assignment made in full discharge of that award his name alone is mentioned; and while there is no doubt that the grant was intended to do for the family all that the decree provided for, there is none also that the grantor must have taken upon himself all responsibility on that score. The wording of the deed will, it is admitted, bear this interpretation, though it is also argued that it may be construed as meaning that *Joy Singh Deb's* relations and dependants will derive their mainte-

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nance generation after generation from the lauds and *mousahs* of the grant. There is, however, no specific proviso against alienation, and the most reasonable inference to be drawn from the whole transaction, and one consistent with the general terms of the deed is, that *Joy Singh Deb* intended it as in full discharge of the decree, and took upon himself the responsibility of providing for his own dependants. That such a responsibility should fall on the head of the family is natural, and that the party undertaking it should consider the acquisition of landed property the best mode of ensuring to himself the means of so providing for his relations, accounts in an intelligible way for the grant being created for his benefit. After the lapse of so many years, and after ascertaining from the record before us that *Joy Singh Deb* did not hesitate to meet this assignment as conveying to him absolute right over the property, it would require very cogent evidence to induce the Court to supersede his acts, on the understanding that he had wilfully or inadvertently misconstrued the terms on which the assignment had been made in his favour. No sort of evidence has, however, been submitted to us in proof of a restrictive power having been vested in *Joy Singh Deb*, or that other members of his family had ever opposed him in dealing with the property. Believing this *sunnud* to have conveyed to him the power of sale, &c., we see no reason to doubt either the fact of the particular sale pleaded by the Appellant, or the possession under it by *Gunga Narain Roy* and the Appellant for more than twelve years before institution of this suit. The present claim, then, cannot be one which only arose after the demise of *Joy Singh Deb*. It brings in question a registered deed which has never been disputed since its execu-

tion to the present time, and under which possession had continued for upwards of twelve years. The suit is manifestly barred by the law of limitation, and reversing the judgment of the Lower Court we decree the cost of the suit to the Appellant."

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The appeal was from the decree.

The Solicitor-General (Sir *H. Palmer*), and Mr.

W. field, for the Appellant; and

Sir *Hugh Cairns*, Q. C., and Mr. *Leith*, for the Respondents.

On part of the Appellant it was contended, that the only question involved was, whether by the terms of the *sunnud* of 1795, *Joy Singh Deb* had power to alienate the *mouzahs* as against his rights, *W. H. Macnaghten's* "Princ. of Hindu Law," Vol. I. p. 9, and whose right of possession, it was insisted, with reference to the Law of limitation of suits, only accrued on *Joy Singh Deb's* death.

The Respondents' case was, first, that the *sunnud* conveyed an absolute estate of inheritance to *Joy Singh Deb*, without any restriction upon the general power of alienation given by the law of *Bengal* to a Hindoo father in possession of an estate of inheritance; that even if there had been such limitation, it would have been inoperative, as being contrary to the spirit and policy of the Hindoo Law as administered in *Bengal*; that the six *mouzahs* being a portion only of the lands granted by the *sunnuds*, were sold and conveyed to *Gunga Narain Roy* absolutely by *Joy Singh Deb* for a valuable consideration. Secondly, that it did not appear that there were at the time when the suit was brought any

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persons in existence who could properly come within the designation or description of "*Lowahokans*," or "*Motalokans*" on the side of the late *Rajah Joy Singh Deb* in the *sunnud* mentioned, or if there were, that their claim was against the heirs of *Joy Singh Deb*, or the estate left by him, and not against the Respondents in respect of the *mouzahs* purchased by *Gunga Narain Roy*.

The Lord Justice KNIGHT BRUCE:

Their Lordships, in this case, agree with the Counsel for the Appellant, that the question of the construction of the instrument of 1795 was, if not the only question, at least, that alone which it is necessary for their Lordships to decide.

Their Lordships are of opinion, that the reference to maintenance was merely for the purpose of showing what we should call the consideration for the instrument, or the transaction.

The question is not, whether the maintenance of the two classes of persons here described was, or was not, the condition of the grant so as to render it void, or voidable, in the event of the maintenance not being afforded—a point upon which their Lordships give no opinion—nor is it a question before us whether it is what English lawyers would call a trust, or a charge, affecting the lands in favour of the class to be maintained. Upon that point also, we think it unnecessary to give an opinion. The question is, whether land dedicated permanently to maintenance of a particular class, is to remain inalienable in the hands of the person to whom the grant was made, and his descendants, as long as there should be descendants of his, for ever, so as to prevent a sale and to render it perpetually inalienable. Whether that be the law

• which governs landed property of this description, their Lordships also do not mean to intimate any opinion, but assuming for the sake of the argument, that it can be, it does not appear to their Lordships that this is a case of that description. They do not collect from the instrument an intention that from son to son, it should remain in the family: with the head of the family for the time being, in order to enable him to afford the maintenance.

Their Lordships are of opinion, that giving the land to a member of the family to whom it was given, had the same effect, and was an act of the same character as giving a sum of money to him absolutely, in lieu of any claim for maintenance burdened with the duty upon his part of maintaining those who ought to be maintained. If that had been done, their Lordships are of opinion, that the money would have been absolutely the property of the person to whom it was given, and that would have well discharged the duty incumbent upon the person who should have paid the same.

We think, that the words at the end of the instrument, rightly construed, render this construction sufficiently certain; for the words are "continue to hold and enjoy possession to us uninterruptedly from generation to generation" Every part of that portion of the deed appears to their Lordships to refer to the enjoyment of the land, and not the identity, or the persons, or the continuance of the persons of those who were to be maintained.

Their Lordships are of opinion, therefore, that the judgment immediately under appeal is right; that the *Sudder Dewanny* Court rightly differed from the *Zillah* Court, and that the appeal must be accordingly dismissed with costs.

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NARAGUNTY LUTCHMEEDAVAMAH ... *Appellant,*

AND

VENGAMA NAIDOO ... *Respondent.**

On appeal from the Sudder Dewanny Adawlut at Maaras.

3rd & 4th
Dec., 1861.

The nature of the *Polliam* tenure in *Madras* investigated.

A *Polliam* is ancestral estate of the nature of a *Raj*; and although it may belong

to an undivided family, yet it is not subject to partition. It can be held by only one member of the family, who is styled the *Polligar*. The other members of the family are entitled to maintenance out of the *Polliam*.

The succession to the *Naragunty Polliam*, being ancestral estate, held to vest in the nearest undivided male cousin of the *Polligar* last seized, who died without issue male, in preference to his widow.

The presumption is, that a Hindoo family remains undivided; the *onus* is upon a party claiming, as upon a partition, to prove division of the joint estate.

In 1847, *A.* presented a petition to the Civil Court of *Chittoor* for liberty to sue in *forma pauperis* for recovery of a *Polliam*. The Court was of opinion that, under *Mad. Reg. IV.* of 1831, *A.* could not be permitted to sue without obtaining the authority of the Government. In *May*, 1848, *A.* obtained the sanction of the Government, and in *October* of that year he presented a petition for leave to sue in *forma pauperis* and at the same time, lodged his plaint. On the 13th of *November*, 1848, the plaint and petition were ordered by the Court to be filed. The order for service of the petition and plaint requiring the Defendant to show cause why *A.* should not be allowed to sue in *forma pauperis* was not served until

IN this case, the suit was brought in the *Zillah* Court of *Chittoor* against the Appellant by *Kooppay*

* Present: Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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Naidoo, the father of the present Respondent, to recover from the Appellant the *Polliam* of *Naragunty*, with mesne profits.

- The principal question involved in the suit was with respect to the right of succession to the *Naragunty Polliam*; whether in an undivided family, the *Polliagar* last seized dying without issue male, the widow, or the nearest male cousin of the deceased *Polliagar*, was entitled to succeed to the *Polliam*.

The fact were these :—

The *Naragunty Polliam* was an ancestral estate, of which *Anantappa Naidoo* was the original *Polliagar*. He was succeeded by his elder son, *Vengama Naidoo*, the second *Polliagar*, whose son, *Venkatashellapathy* died before him, leaving two sons, *Venkatappa Naidoo* and *Anantappa Naidoo*, both infants, the estate remaining undivided. It appeared, that the next *Polliagar* was *Krishnappa*, or *Krishnama Naidoo*, younger brother of *Vengama Naidoo*, the paternal grand-

August, 1849. No cause was shown, and the proceedings stood in that position on the 16th of *September*, 1849, when twelve years, (the time limited by *Mad. Reg. II. of 1802, sec. 18. cl. 4*), from the 16th of *September* 1837, when the cause of action accrued, had expired. The plaint was by a subsequent order of the Court filed on the 1st of *March*, 1850. Held :—

First, that the proceedings of the Civil Court of *Chittoor*, on the 13th of *November*, 1848, were by *Mad. Reg. VII. of 1818, sec. 5*, irregular, as the course there directed was to serve the petition and plaint on the party proceeded against, to show cause within a certain time why the Plaintiff should not be allowed to sue *in forma pauperis*.

- Secondly, that the suit was not barred by *Mad. Reg. II. of 1802, sec. 18, cl. 4*, as A had preferred his claim within the prescribed period to a Court of competent jurisdiction, and had been prevented from commencing his suit in proper time by the irregular proceedings of the Court.

The native Courts in India, in receiving evidence, do not proceed according to the strict technical rules adopted in England. According to the practice there, a copy of a public document, authenticated by the signature of the proper Officer, is received as *prima facie* evidence, subject to further inquiry, if it is disputed.

- It is not the practice of the Judicial Committee to advise the reversal of a decision of the Court below, merely on the effect of the evidence or the credit due to witnesses, as the Judges in India have better means of determining questions of fact than the appellate Court.

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father of the first Plaintiff; and that he was succeeded by his son, the first Plaintiff's father, *Vengama Naidoo*, and that the *Polliam* remained undivided. On his death, as the Plaintiff and his brothers were very young, and as *Venkatappa Naidoo* and *Anantappa Naidoo* were men of influence, and as the two branches of the family lived in harmony, *Venkatappa Naidoo* became *Polligar* of the estate, which continued undivided. *Venkatappa Naidoo* having no son, adopted his nephew, *Vengama Naidoo*, son of his brother, *Anantappa Naidoo*, and died shortly after, but *Vengama* being too young at the time, his natural father, *Anantappa Naidoo* succeeded to the *Polliam*. *Vengama Naidoo*, on his father's death, succeeded him as *Polligar*, and having no sons, he adopted his sister's son, *Venkatappa Naidoo*. In the year 1820, the *Polliam* was taken under management of the Government, pending the liquidation of the *Polligar's* debts, but in the year 1825, the *Polliam* was discharged from the attachment, and restored to *Vengama Naidoo*. Whilst the *Polliam* was under attachment, allowances were made by the Government to the *Polligar*, *Vengama Naidoo*, who thereout allowed *Kooppay Naidoo*, the Respondent's father, as a member of the undivided family, a portion for his expenses. On the 8th of December, 1828, *Vengama Naidoo* died, whereupon two claimants asserted their right to the *Polliam*, *Venkatappa Naidoo*, as the adopted son of *Vengama Naidoo*, and *Kooppay Naidoo*, the Respondent's father, under a *Kararnamah*, dated the 8th September, 1825, by which he alleged he was appointed his successor, and as next heir of an undivided family. *Kooppay Naidoo* had two elder brothers, *Kistnappa Naidoo* and *Moodoo*

Kpistnama Naidoo; but they, by two *Kararnamahs*, or transfer deeds, dated respectively the 19th of January, and 1st of July, 1831, assigned all their rights in the *Polliam* to their brother, *Kooppay Naidoo*.

On the 6th of December, 1813, *Kooppay Naidoo*, commenced a suit in the then Central Provincial Court against *Venkatappa Naidoo* and others, to obtain possession of the *Polliam*, claiming as the next heir of the undivided family on the death of *Vengama Naidoo* without male issue, and disputing the validity of the adoption by the latter of *Venkatappa Naidoo*. By the decree of the Central Provincial Court, dated the 31st of December, 1836, that Court after admitting evidence of the relationship and the common descent of *Vengama Naidoo* and the Plaintiff from *Anantappa Naidoo*, the root of the family, and that the plaintiff's grandfather and father had been in possession of the *Naragunty Polliam* held, that *Vengama Naidoo* had legally adopted *Venkatappa Naidoo* the late *Polligar*, as his son, and pronounced him to be the heir of the *Polliam* of *Naragunty*. In consequence of this decision, *Venkatappa Naidoo* remained in possession as *Polligar* until the 16th of September 1837, when he died without male issue, leaving the Appellant, his widow, him surviving, who took possession of the *Polliam*, claiming it as his heir. The possession of *Venkatappa Naidoo* was not acquiesced in by *Kooppay Naidoo*; but the latter omitted to prosecute his appeal from the decree of the 31st of December, 1836, for want, as it was alleged, of means. On the 3rd of September, 1838, *Kooppay Naidoo* made an application to the *Sudder Adawlut* for the admission of an appeal in *forma pauperis* from the decree of the Central Provincial Court

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of 1836, stating the death of the Appellant's husband without male issue subsequent to the decree. On the 22nd of *October*, 1838, the *Sudder Dewanny Adawlut* passed an order, refusing the admission of such appeal, the period for appealing having long expired, and stating that any new ground of action by the Petitioner for the recovery of the estate could only be asserted by a new suit. Accordingly, *Kooppay Naidoo*, in the year 1847, presented a petition to the Civil Court of *Chittoor*, praying for leave to institute a suit in that Court for the recovery of the *Polliam*; but the Court, in *December* of that year, held, that no such order could be given unless he produced the authority of the Government to that Court, directing it to entertain the suit. In the meanwhile the first Plaintiff's elder brothers, *Krishnappa Naidoo*, and *Moodoo Kristnama Naidoo* having died, *Kooppay Naidoo*, the Respondent's father, became the nearest heir of *Vengama Naidoo*, and on the 13th of *May*, 1848, he presented a petition to the Governor of *Madras* for an order permitting him to establish his right to the *Polliam*, by means of a regular suit, under the provisions of *Mad. Reg. IV.* of 1838; and on the 30th of *May*, 1848, an order was made by the Government permitting him to prosecute such claim in the Courts.

Accordingly, on the 5th of *October*, 1848, a petition was filed in the Civil Court of *Chittoor* by *Kooppay Naidoo* and the Respondent, his son, for leave to file a plaint, in *forma pauperis*, against the Appellant, which leave was granted on the 13th of *November*, 1848, though the order for service of the petition and plaint on the Appellant was not made by the Court until the 31st of *July*, 1849. The plaint

was by an order of the Court filed on the 1st of *March*, 1850, and set forth the above genealogy of the Plaintiffs, alleging that the Plaintiffs and the Defendant's husband were members of an undivided Hindoo family, tracing their descent from the original *Polligar, Anantappa Naidoo*, it also stated that the *Polligars* were taken sometimes from the elder branch and sometimes from the younger branch of the family, and that from the latter branch the Plaintiffs were descended. That the *Polligars* whilst in possession, made allowances to the members of the other branch: and, particularly, that the *Pilligar, Vengama Naidoo*, had made allowance to the first Plaintiff, and by a deed had named him his successor. That on the death of *Vengama Naidoo*, the Defendant's husband, *Venkatappa Naidoo*, claimed to be *Polligar*, as his adopted son; and after stating the proceedings in the original suit of 1831, the appeal therein, and the permission from the Government to sue, it alleged that the Defendant's husband having died without male issue, she had no legitimate title to the *Polliam*, which had been his undivided estate. That the first Plaintiff was entitled to the *Polliam*, as next heir and successor of the undivided family, and after stating the annual net profit at Rs. 10,000 or thereabouts, the Plaintiffs claimed mense profits from the 22nd of *October*, 1838, to the date of the plaint, at the above rate, amounting to Rs. 92,920; and prayed that the above sum, and the *Polliam* of *Naragunty*, might be awarded to them, as against the Defendant.

The Defendant by her answer alleged, that her husband and his ancestors were *Polligars* of *Naragunty* but not the first Plaintiff's father or grandfather, who she insisted had no manner of title thereto. That her

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husband having died without male issue, she, under the Hindoo law as the chief heiress, was entitled to succeed to the *Polliam*, which the Government had continued to her. That the suit of 1831, before the Central Provincial Court, having been decided against the Plaintiff, the present suit was barred by sections 9 and 10, of *Mad. Reg. 11.*, of 1802. That the suit was further barred by clause 4, section 18, of the same Regulation. That it was unknown whether any relationship existed between the ancestors of the Plaintiffs and those of the Defendant's husband; and even if any had existed, that it might have become extinct in course of time, and she finally insisted that the Plaintiffs and her late husband were not members of an undivided family.

Both parties entered into evidence. On the part of the Plaintiffs, among other documents, a copy of a genealogical table of the *Naragunty* family, dated *Fusly 1211* (A.D. 1802) sent by *Anantappa Naidoo* to the East India Company, procured from the records of the Collector of *Chittoor*; was filed. This document was as follows: "*Anantappa Naidoo, Polligar of Naragunty* had two sons, viz. *Vengama Naidoo* and *Krishnappa Naidoo*, both of whom held the *Polliam*. The former had a son named *Vencatachellapaty Naidoo* who had two sons, *Venkatappa Naidoo* and *Anantappa Naidoo*. *Vencatachellapaty Naidoo* died without ever holding the *Polliam*, and his son, *Venkatappa Naidoo*, succeeded to it, but having had no issue adopted his brother's son, *Vengama Naidoo*. I, *Anantappa Naidoo*, now hold the *Polliam*. The said *Krishnappa Naidoo's* son, *Vengama Naidoo*, was *Polligar*; and his sons are *Krishnappa Naidoo*, *Mooddoo Krishnappa Naidoo*, and *Kooppay Naidoo*." The Record Keeper of the Collector's *Cutchery*, was

called by the Court to prove the record and copy of this genealogical tree, which it appeared was filed with similar lists of families of other *Polligars* in the Collector's office. Other documents, consisting of a copy of an *arzee* from *Vengama Naidoo*, the *Polligar* of *Naraguntty*, to the Principal Collector of North Arcot, dated the 17th of November, 1823, stating that he had no concern with Defendant's husband, who had left his protection. A *Mahzarnamah* executed by the *Polligars* in the *Chittoor Talook* to the East India Company, dated the 1st of April, 1828, giving therein the names of the possessors of the *Naraguntty Polliam* for the last century and a half, and showing both branches of the family to be entitled; a *Mahzarnamah* executed by the *Enamdars*, *Kurnums* and public officers attached to *Naraguntty Polliam* to the same effect; a *Kararnamah* executed to *Kooppay Naidoo*, the Respondent's father, by his elder brother, *Kristnappa Naidoo*, on the 1st of July 1831, in which the latter resigned to the former his claim on *Naraguntty Polliam*; a *Kararnamah* executed by his other brother, *Mooddoo Kristnamah Naidoo*, on the 19th of January, 1831, to the same effect. They also examined witnesses to prove the relationship of the families; that the family was undivided, and the value of the annual profits. Witnesses were also examined by the Defendant, some to prove their ignorance of the relationship; and others, to prove the value of the annual profits.

The following question was propounded by the Court to the Pundits of the *Sudder Adawlut*:—"This *Polliam*, the ancestral property of a family said to be undivided, has descended to an adopted son *K*, and, on his death without male issue, is taken possession of.

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by his Widow *L*. The *Polliam* is now claimed by *H*, and, *J*, the cousins of *I*, the adoptive father of *K*, as their inheritance. Is such claim valid? or is *L*, the widow of the adopted son *K*, who died without male issue, entitled to succeed to the *Polliam*?"

The Pundits answered as follows:—"The Hindoo law books, '*Vijnyaneswara*,' &c., declare, that all the members of an undivided family have a joint right in their ancestral property, although only one of them, being capable, continues in possession thereof. *I*, who had no issue, was not justified in adopting *K*, a stranger, as son, to the exclusion of his undivided cousins *H* and *J*; but, as he adopted him, he (*K*) became a member of the said undivided family, and the said *H* and *J*, being his undivided cousins, still retain their joint right in the ancestral property of the family. It is only when a family is divided that a widow succeeds to the estate of her husband, who died leaving no son; but when the family is undivided, the right of succession rests, not in the widow, but in the undivided cousins. This being the rule of the Hindoo law, *H* and *J*, the undivided cousins of *I* and *K*, are alone entitled to inherit the ancestral *Polliam* referred to in the question. *L*, the widow of *K*, has no right to succeed to it."

On the 4th of *March*, 1856, the Judge of the Civil Court of *Chittoor*, Mr. *A. S. Mathison*, passed a decree in favour of Respondent's father. The decree was, in substance, as follows:—First, that the decree of the Central Provincial Court in 1831 was no bar, as it appeared by that decree that the first Plaintiff then claimed the *Polliam*, not from the Defendant, but from her husband, on the ground that the adoption of the latter was illegal. But the adoption being con-

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firmed, and the first Plaintiff's suit of 1831, dismissed on that ground, the Plaintiff could not be prevented from bringing the present action on the different ground of his claim to succeed to the estate being preferable to that of the widow of the former Defendant, the last *Polligar*. Second, that the Plaintiffs had proved their descent from the younger son of the founder of the *Naragunty* family, and that the first Plaintiff was the eldest surviving male member of the younger branch, his elder brothers being dead. Third, that the Plaintiffs were members of the undivided family, with the *Polligar*, *Vengama Naidoo*, and his lineal ancestors, the *Polligars* of *Naragunty*. Fourth, that the evidence, both oral and documentary, fully proved that the first Plaintiff was the undivided cousin of *Vengama Naidoo*, a similar conclusion having been come to by the Central Provincial Court, as shown in their decree in the former suit. Fifth, that the first Plaintiff was entitled to succeed on the demise of the Defendant's husband, who died without male issue, in preference to the widow; the answer of the Pundits of the *Sudder* Court being considered decisive on that point. Sixth, that as to the extent of the income from the *Polliam* during the past years claimed by Plaintiffs, it was unnecessary to decide, as under the *Mad. Reg. IV.* of 1831, a suit could only be entertained in the Court under the authority of the Government, dated the 30th of *May*, 1848, allowing the first Plaintiff to prosecute his claim in the established Courts; and as the Defendant had been, up to that time, in possession given to her by Government, she could not be called upon to refund any past profits; and lastly, the Court admitted the right of the first Plaintiff to the ancestral estate, and adjudged

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the Defendant to deliver the *Polliam* over to him, but disallowed the claim for past profits, and decreed the Defendant to pay a proportion of the costs of the suit.

An appeal from this decree was interposed to the *Sudder Adawlut*. In the petition of appeal the Appellant took four specific grounds of objection to the decree appealed from; first, that the Plaintiffs had no new ground of action in the present suit; secondly, that they were barred by the Regulation of Limitations, *Mad. Reg. II. of 1802*, secs. 9 and 10, and also by cl. 4, sec. 18 of that Regulation; thirdly, that the first Plaintiff failed to prove his claim as an undivided cousin of the late *Vengama Naidoo*; and lastly, that he was not entitled by the Hindoo law to succeed to the *Polliam* in preference to the Appellant. The petition also entered into a minute objection to the nature of the evidence of the first Plaintiff being the undivided cousin of the late *Vengama Naidoo*, and of his relationship; and also to the reception of evidence by the Court below, particularly with respect to the genealogical table; submitting that the original document was not produced, as it ought to have been, but a copy without signature, and evidently not the original document had been improperly admitted, and urged that as the Record keeper deposed that the original was in the Record office, the original ought to have been produced.

On the 5th of *March*, 1857, the *Sudder Adawlut*, consisting of Messrs. *Anderson* and *Goodwin*, pronounced a decree, affirming the judgment of the Civil Court, and observing on the Appellant's four objections to it in order, as follows:—First objection.—Whether the Plaintiff's suit was not barred by sections 9 and 10, Regulation II. of 1802. That the causes of action in the suit, No. 24, of 1831,

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and the present suit were entirely different; that the original suit, No. 24, of 1831, was dismissed as the adoption of Defendant's husband's was established, while in the present suit the first Plaintiff's cause of action was, that he being nearest male heir in an undivided family, had a preferable claim to that of the Defendant, the sonless widow, of the party whose adoption had been so upheld. Second objection.—That the first Plaintiff's claim was barred by clause 4, section 18, Regulation II. of 1802. It was not denied that the Defendant's husband died on the 16th September, 1837, consequently the twelve years had not expired in 1848, the year when the present suit was commenced by the presentation of the pauper plaint, &c. Third objection.—That the first Plaintiff had failed to prove his claim as an undivided cousin of the late *Vengama Naidoo*; that the decree of 1831, to which both parties referred, showed that the Defendant's husband then tacitly admitted that the first Plaintiff was an undivided collateral cousin, though maintaining that a collateral cousin's claim was inferior to his own, as an adopted son. That the acting Civil Judge of *Chittoor* was right in stating that the Central Provincial Court came to the conclusion, that the first Plaintiff was the undivided cousin of *Vengama Naidoo*; that in the present suit the Defendant's denial of the Plaintiff's relationship to the *Naragunty Polligar* was by no means so clear and decided as might have been expected if he was not an undivided collateral heir. That a strong *Prima facie* presumption was therefore, raised in favour of the truth of the Plaintiff's claim, and the Court agreed with the Civil Judge respecting the relationship existing in the *Naragunty* family. And, on the fourth and last objection, the *Sudder* Court decided, that



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the first Plaintiff was not entitled by the Hindoo law to succeed in preference to the Defendant. "That there appeared to be no reason why the *Polliam* in question should not be considered as an ancestral estate," the succession to which was regulated by Hindoo law. That if, as alleged by the Appellant, "succession in each individual instance is dependent on the will of Government, and as such the widow of the late incumbent is the legal heir to the estate in preference to any distant male relation," the Government would have disposed of the first Plaintiff's claim, and not have referred him for redress to the Civil Courts: and lastly they declared that the answer of the Pundits that the right of succession rests, not in the widow but in the undivided cousin, was in strict accordance with Hindoo law. The appeal was, therefore, rejected by the Court with costs.

This appeal was from such decree.

The Respondent's father having died since the decree in his favour, his rights descended to the present Respondent, his son and heir, by whom the appeal was revived.

Sir *Hugh Cairns*, Q. C., and Mr. *Badeley*, for the Appellant.

First.—We submit that the *Polliam* in dispute is not ancestral estate, nor were the parties in the suit members of an undivided Hindoo family. The reasons given by the Court below for holding the contrary opinion are insufficient. Much of the Plaintiff's evidence in the Civil Court of *Chittoor* was inadmissible, particularly the genealogical table, purporting to show the relationship, which is not entitled to any weight, and ought not to have formed the basis of the judgment of that Court, or the *Sudder Adawlut* on appeal. The latter

judgment is most unsatisfactory ; it contains not the slightest examination either of the oral or of the documentary evidence adduced in the Court below ; and although the objections to the Plaintiff's evidence had been carefully brought before the *Sudder Adawlut* in the petition of appeal, and much of it was shown to be inadmissible and untrustworthy ; there was not the slightest attempt to sift or to deal with it, and the adoption of it in a lump, when parts of which were clearly bad, is sufficient to invalidate the judgment. Again, the view of the Hindoo law which the *Sudder Adawlut* took in the conclusion of its judgment is wholly at variance with the law as declared by the Pundits admitted in the original suit of 1831, and even, if taken to be correct, is inapplicable to a state of things like the present suit.

Then, upon the question of limitation of suit, the judgment is clearly erroneous. In the first place, it proceeds upon the mistaken notion that the cause of action in the present suit, was not the same as the one which had been decided in the Central Provincial Court in the year 1836, and consequently, that it was not barred by sects. 9 and 10 *Mad. Reg. II.* of 1802 ; whereas it is clear from the judgment in that suit, that the cause of action there, was substantially the same as here both, suits being to recover the same estate, and brought by the same Plaintiff upon the same alleged title ; the only difference being, that the Defendant in the second suit was the widow of the Defendant in the first. But still, as his widow and representative, she only claimed through him. In such a case, it is obvious, that the mere change of parties could make no difference in the merits of the action ; and that between the parties then contesting the estate, the judgment in the previous suit of 1831,

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operated as a direct estoppel; and, as in every action of ejectment the Plaintiff must recover, if at all, upon the strength of his own title alone, and not upon the weakness of the Defendant's, the first Plaintiff, in either suit, was bound to establish his title generally, and must be considered to have failed to do so, in the opinion of the Central Provincial Court. The Plaintiff's claim, therefore, could not lawfully be revived in the Civil Court of *Chittoor* after such an adjudication. As, therefore, the then Plaintiff, allowed the whole period for appealing against that adjudication to pass without any attempt to reverse it, he surely must be deemed to have admitted its validity and the insufficiency of his own title. Secondly, it is submitted, that the *Sudder Adawlut* was wrong in holding that the Plaintiff's claim was not barred by the Regulation of Limitations, cl. 4, sec. 13, Reg. II. of 1802, for his cause of action, if any, commenced when his alleged title accrued; and this, according to his own showing, was upon the death of *Vengama Naidoo*, in the year 1827 or 1828, more than twenty years before the commencement of the present suit, and, therefore, much longer than the period of twelve years fixed by that Regulation. Even, therefore, if the suit was commenced within twelve years, as reckoned either from the date of the judgment of the Central Provincial Court in 1836, or from the death of the Appellant's husband, which event seems somewhat uncertain, he could not, when the original suit of 1831 had not been kept up, give a fresh title, or a new cause of action, by merely instituting another suit against a Defendant, whose right to the possession of the estate had been already ascertained by the previous decision. In the third place, it must be observed, that the manner in which the *Sudder Court*

professes to deal with the Plaintiff's proof of his title in the Civil Court of *Chittoor* is most unsatisfactory, and such as cannot be admitted in any real adjudication upon the merits of that part of the case. The judgment, moreover, is in fact inconsistent with itself, as well as wholly unfair, for it rests upon the decree in the original suit of 1831, and the supposed admission of the Appellant's husband in that suit as destroying the Appellant's case, although it just before declared that the causes of action in that suit, and in the suit then before them were entirely different and that the decree in the suit of 1831, did not bind or affect the Plaintiff in the existing suit, or entitle the Appellant to make use of it against him. But if the cause of action was entirely different, and the Defendant in the second suit was a stranger to the first, it is difficult to see upon what grounds, either of law or equity, the Court could adopt such a principle of decision. If the decree of 1831 and the proceedings in that suit were good against the Appellant, they surely were equally good for her, and if so, she was entitled therewith to estop the Plaintiff. The judgment appealed from upon that ground, stultifies itself.

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The Solicitor General (Sir *R. Palmer*), and Mr.  
*W. W. Mackeson*, for the Respondent.

First.— as to the nature of the *Polliam* of *Naragunty*. This peculiar tenure is described in the 5th Report on the affairs of the East India Company, in 1812, pp. 117, 150, 730-1. It is a species of tenure which in olden times was held by petty chieftains, for services rendered to the State, and althoughs the *Polligars* acknowle 'ged the State as paramount, yet

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they were, in fact, almost independent. Such tenure is recognised by *Mad. Reg. IV. of 1831*, and a *Ghatwal* tenure, of similar nature was upheld by this Court, *Raja Lalanund Sing Bahadoor v. The Bengal Government*, (a). It is ancestral and indivisible as in the case of a *Raj*, and descends to a single heir. *Strange's "Hindu Law,"* Vol. I, pp. 198, 208, 236; *Stranges "Manual of Hindu Law,"* p. 47 the other members of the family are not co-parceners, but constitute an undivided family, *Strange's "Hindu Law,"* Vol. I., p. 199, and are only entitled to maintenance, without partition, *Colebrooke's Dig.* Vol. II, pp. 532-3, citing *Narada*, Our case is, that the late *Polligar, Venkattappa Naidoo*, being a member of an undivided family, the Respondent, as his next undivided cousin, was entitled to succeed to the *Polliam*, in preference to the Appellant, the widow of the late *Polligar*. Where, by family custom, a *Zemindary* has always been held by a chief male heir, the brother takes in preference to the childless widow. *The widows of Raja Zorawur Sing v. Koonwur Pertee Sing* (b), *Koonwar Bodh Singh v. Seonath Sing* (c). No doubt can be entertained as to the relationship, or that the Respondent's father was the next heir. His elder brothers, *Krishnappa Naidoo* and *Mooddoo Krishnama Naidoo*, had released to him their rights to the *Polliam*, and moreover they being dead who the present suit was brought, the Respondent's father was, undoubtedly, the next heir. The relationship was but faintly denied by the Appellant in her pleadings. The Respondent's witnesses speak positively from their own knowledge; whereas the Appellant's. witnesses.

(a) 6 Moore's Ind. App. Cases, 101. (b) 4 Ben. Sud. Dew. Rep. 57.  
 (c) 2 Ben. Sud. Dew. Rep. 97.

merely express their ignorance of any relationship. The genealogical table produced from the Collector's records is decisive upon this question. It purports to have been sent by the then *Polligar* to the East India Company in the year 1802. The *Polliams* of *Chittoor* had been acquired by the East India Company, by treaty, in the year 1801; and the genealogies of the *Polligars* in that district were presented at the same time with the *jummabundy* account, to enable the Government to fix the permanent settlement. The *Mahsarnamahs*, which are documents signed by other *Polligars* of the District, and by the *Enamdars*, *Kurnims*, and other public officers of the *Polliam* itself, are equally clear in support of the relationship. This kind of evidence is frequently resorted to in order to arrive at facts, which are matters of public notoriety in particular Districts.

Secondly, as to the family constituting an undivided family. *Naragunty* is an ancestral estate of considerable standing, and the *onus* of proving division falls on the Appellant. The presumption is in favour of union, as the Hindoo law presumes joint tenancy as the primary state of every Hindoo family, *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (a), *Strange's "Hindoo Law,"* Vol. I, p. 325, *Strange's "Manual of Hindu Law,"* p. 49, but the Appellant has given no evidence of division of the ancestral estate. The genealogical table, and the *Mahasarnamahs* prove that the family was undivided. It was distinctly in evidence that the *Polligars* came from the elder and younger branches, as most capable persons presented themselves; and that the rest of the family lived and messed together, or received allowance from the head

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(a) 3 Moore's Ind. App. Cases, 229.

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of the family. With respect to the right of succession in undivided families, the law, as expounded by the Pundits, in this case is undisputed, namely, that if a member of an undivided family dies without male issue, his undivided cousin is preferred to his widow.

Thirdly, the decree in the original suit in 1831, was no bar to the present suit under *Mad. Reg. II.* of 1802, secs. 9 and 10. That suit was brought to try the validity of the adoption of the late *Polligar*. The present suit is entirely different, and brought to try a new question, which only arose at his death, namely, the disputed succession between the widow and the undivided cousin. The issues in the two suits were, therefore, entirely different.

Lastly, the suit is not barred by the Regulation of Limitations. *Mad. Reg. II.* of 1802, sec. 18, cl. 4, prescribes twelve years as the limit. Here the right accrued on the death of the late *Polligar*, on the 16th of *September*, 1837; and the present suit was commenced, at all events, on the 13th of *November*, 1848. In calculating the period of limitation, the circumstance of the application to sue in *formâ pauperis* must not be lost sight of. *Rahm Khan v. Bikram Samee* (a), *Mahatab Chand v. Mirdad Ali* (b), *Futteh Jan Bebee v. Noorunnissa v. Chowdraine* (c). *Macpherson*, on Civil Procedure, p. 65, citing *Sel. Rep.* 20th *January*, 1838, vol. 7, p. 8; 14th *June*, 1842, vol. 7, p. 96, lays it down that no effect can be given to a plaint to sue in *formâ pauperis* till authority is given to sue, and that the period of limitation ends on the day on which the plaint is lodged. No irregularity of the Court in the proceedings that took place in respect to filing the plaint, can prejudice the Respondent. If there was any laches, it was the act of

(a) 7 Ben. Sud. Dew. Rep., 96. (b) 5 Ben. Sud. Dew. Rep., 268.  
(c) 14 Ben. Sud. Dew. Rep., 175.

the Court, and that fact took the case out of the operation of the Regulation of limitations, as it came within the words of the Regulation, as an exception "for good and sufficient cause, whereby he was precluded from obtaining redress," and has so been decided in respect to the *Ben. Regulation of Limitations* II. of 1803, sec. 18. cl. 3. *Troup and Dyce Sombre v. The East India Company (a)*, *Rajah Enayet Hossein v. Sayud Ahmud Reza (b)*.

Their Lordships' judgment was delivered by

Lord KINGSDOWN :

-Two questions were argued before us in this case :

First, whether the Plaintiff the suit had established his claim.

Second, whether his suit was commenced within such a period after the accruer of his title, that the Court was warranted in entertaining his demand.

The subject of dispute is a *Polliam* called *Naraguntty*, in the District of *Chittoor*, in the Presidency of *Mardras*.

In order to make the facts of the case and the bearing of the evidence more clear, it may be convenient to state what is the nature of a *Polliam*.

A *Polliam* is explained in *Wilson's Glossary* to be "a tract of country subject to a petty Chieftain." In speaking of *Polligars*, he describes them as having been originally petty Chieftains occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent ; but as having, at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. This corresponds with the account read

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at the Bar from the Report of the Select Committee on the affairs of India, 1812. A *Polliam* is in the nature of a *Raj*. It may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the *Polligar*, the other members of the family being entitled to a maintenance or allowance out of the estate.

The *Polliam* in dispute, at time when the East India Company acquired the sovereignty of the District in 1802, was held by a family of the name of *Naidoo*. Possession of this and of several other *Polliams* in the same neighbourhood was assumed by the Company, and held by them for several years. They ultimately, however, restored the *Polliam*, *Naragunty*, to the *Naidoo* family, different members of which were at different times *Polligars*, and in 1837, *Venkatappa Naidoo* died in possession of the property.

He died without male issue, and the present Appellant, who was his widow, entered into possession, asserting title as heir of her late husband.

The present suit was instituted by the Respondent and by his father, *Kooppay Naidoo*, who is since dead, for the purpose of recovering possession of the *Polliam* from the widow.

The case which they made, was that the *Polliam* was ancestral property, that it belonged to the family of *Naidoo*; that the family was undivided, and that on the death of the last possessor the right to it vested in the next male heir of the family in preference to the widow, and that they (the Respondent's father and the Respondent) were such male heirs. *Kooppay Naidoo* being next male heir.

The Pundits consulted by the Court as to the rule of Hindoo Law on the assumption that the Plaintiffs

had established their allegations by evidence, were of opinion that they were entitled to succeed. This view was adopted by the Court below, and no objection to the decision upon this point has been urged at our Bar.

Both parties went into evidence as to the facts; and the *Zillah* Court first, and the *Sudder* Court afterwards upon appeal, were of opinion, that the Plaintiffs had sufficiently proved their case, and no difference of opinion existed amongst the Judges below.

It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion it must be shown very clearly that they were in error in order to induce us alter their judgment; but in this case we think that the Courts could have come properly to no other conclusion than that at which they arrived.

The points to be established by the Plaintiffs were that the *Polliam* of *Naragunty* was an ancestral property; that it belonged to a family of which they (the Plaintiffs) were members, of which the Respondent's father was the next male heir; and that the family was undivided.

The Appellant by her answer had stated, "that it was unknown whether any relationship existed between the ancestors of the Plaintiff and those of the Respondent's husband, and even if it did exist it might have become extinct in course of time; but that one thing was certain, that the Plaintiff and the Defendant's late husband were not members of an undivided family."

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The Plaintiffs, amongst other evidence, produced a document which, if it be genuine and correct, establishes beyond doubt that the Plaintiffs and the Appellant's husband were members of the same family; that the property was ancestral, that it had been enjoyed at different times by members of the elder branch to which the Appellant's husband belonged, and by members of the younger branch to which the Plaintiffs belonged, and that the family at the date of this document was an undivided family; we allude, of course, to the document, professing to be a copy of a paper in the custody of the Collector of *Chittoor*, sent to his office in *Fusly 1211*, corresponding with 1802 of our era.

It cannot be doubted, and was indeed hardly disputed by the able Counsel for the Appellant, that if the statement contained in this paper is to be taken as true, it does very far towards establishing the case of the Respondent; but it was said, that it was a mere loose paper, the possession of which by the Collector was not satisfactorily accounted for; that the original had not been produced; that it did not appear to have any signature attached to it, and that it ought not to have been treated as of any authority.

But on inquiry it turns out that the circumstances under which the paper was lodged in the Collector's office are such as to give it the very highest authority.

When the East India Company took possession of these *Polliams*, as we have mentioned, in the year 1802, they made allowances out of the proceeds to the families of the *Polligars*, and contemplated the restoration at a future time, when other should have been established in the country, of the property so seized, to its owners.

They thought it advisable, in order to give effect to these views, to procure and forward a statement of the particulars of the property so seized, and of the names and families of the existing *Polligars*.

They required, therefore, returns to be made by the *Polligars* of these particulars. The paper in question purports to be a copy of the return made on this occasion by *Anantappa Naidoo*, who then held the *Polliam*. The Appellant, in her petition of appeal to the *Sudder Court*, admits that such a genealogical table may have been given, but denies that there is any evidence that such table was the same as to its contents with the one filed by the Plaintiffs.

But the accuracy of the copy so produced, and the genuineness of the document, are made out beyond all controversy. It was not brought forward by surprise, nor received by the Court without full investigation.

On the 5th of *January*, 1855, the Plaintiffs made a motion to the Court in the following terms:—

“No. 121.

“To the Civil Court of *Chittoor*.

“Motion presented by *Vencatacharry, Vakeel*, on behalf of the Plaintiffs, in original suit, No. 24, of 1850.

“The Plaintiffs being the legal heirs to the *Polliam*, have brought this suit for the recovery thereof, with mesne produce. The Defendant utterly denies in her answer that they are in any way connected with the family. Soon after the country was brought under the British rule, there was a Circular Order issued, requiring all *Zemindars* to present genealogical tables, showing which of their ancestors held their *Zemindaries*. In compliance with this requisition, the Plain-

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tiffs' ancestor also sent to the Collector of *Chittoor*, in *Fusly* 1210 or 1211, a statement of the above description; and this document is now on the records of the Collector, and it was material to the Plaintiff's case. In the same office there is also a statement, showing the average income of the *Polliam* for ten years, prepared when the *Peishcush* thereof was fixed by Government. The Plaintiffs pray that the Court will be pleased to grant a certificate requiring the production of those documents, in order that they may submit them, with their application, to the Collector, for copies thereof."

Having procured a copy of this document, authenticated by the signature of the Collector of *Chittoor*, they submitted it to the Court on the 30th of *January*, 1855.

The native Courts of India, in receiving evidence, do not proceed according to the technical rules adopted in England, and they would, by their usual practice, admit a copy of a public document, authenticated by the signature of the proper officer, as *prima facie* evidence, subject to further inquiry, if it were disputed.

The accuracy of this copy was disputed by the Appellant, and on the 13th of *March*, 1855, she made a motion in the following terms:—

"To the Civil Court of *Chittoor*.

"Motion presented by *Varathacharry, Vakeel*, on behalf of the Defendant, in original suit, No. 24, of 1850.

"1. The Plaintiffs, with their motion, No. 58, presented a copy of an alleged genealogical table in which the name of the first Plaintiff is inserted

as a member of the family. This is a document concocted by the Plaintiffs themselves, and introduced into the Collector's record. For if this were a genuine voucher, the Defendant's father-in-law would not have declared in an *arsee* addressed by him to the Collector, "when he adopted the Defendant's husband, that he had neither uncles nor uncles' sons. Moreover, the said genealogical table neither bears the signature of the party who addressed, nor is attested by the then Collector. The Defendant prays that the Court will, on a consideration of these objections, reject the above document, and pass a just decree."

Hereupon the Court directed a letter to be sent to the Collector on the 31st of *March*, 1850, "requesting him to send up to this Court his Record Keeper, with the original record with which the genealogical table of which the Plaintiffs produced a copy may be connected, or the book out of which the said copy might have been furnished."

On the 7th *April*, the Collector sent an answer by the Record Keeper, intimating "that, with reference to the letter received from this Court on the 31st *ultimo*, the Record Keeper was ordered to appear with the papers required;" and on the same day the Record Keeper attended accordingly. He was examined and cross-examined, and fully established the authenticity of the document, and the accuracy of the copy furnished. He must have had the original in Court, though it does not appear to have been called for. Moreover, there is documentary evidence in confirmation of the accuracy of several of the statements contained in this paper.

Their Lordships, therefore, have not the least doubt that this paper is what it purports to be, and

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that it established the case of the Plaintiffs, unless it can be made out that the family, undivided at that time, became afterwards divided.

Now, the parol evidence of the Plaintiffs, if it is believed, clearly shows that their never was any division. The presumption is that a family remains undivided and the *onus* is in the Appellant to prove division. Her evidence is rather directed to show that the Respondent's father was a member of a different family. At all events, it is quite insufficient to establish a division, when opposed to the evidence produced on the other side.

It is unnecessary to advert to the proceedings in the suit to set aside the adoption further than to say, that in that suit, which was instituted as early as 1831, *Koopy Naidoo* insisted on the same facts and the same title which, in concurrence with his son, he asserted in the present suit. The Court was of opinion, that the adoption was good, and would prevail against the plaintiff's title, assuming it to be made out in point of fact, and, therefore, no decision was pronounced upon that point.

On the whole we may state that, if the question on the effect of the evidence in this case had come before us now for the first time, and not by appeal, we should have arrived at the same conclusion with the Courts below, though in that case it would have been necessary to go more in detail into the particulars of the evidence on both sides, than it is requisite or proper to do, when we have merely to state our concurrence in the judgment already pronounced.

There remains the question whether the Plaintiff's suit is barred by the Regulation for the limitation of actions.

That regulation (Regulation II. of 1802, section 18, paragraph 4) provides that a suit shall not be entertained which is commenced more than twelve years after the right accrued; but this is subject to exceptions, one of which is, if the Complainant can show by clear and positive proof, that he directly preferred his claim within that period for the matter in dispute to a Court of competent jurisdiction, or person having authority, whether local or otherwise for the time being, to hear such complaint, and to try the demand, and, "shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority, or, other good and sufficient cause, he was precluded from obtaining redress."

Here the *Sudder* Court (for the objection does not seem to have been taken in the *Zillah* Court) has held that the suit was actually commenced in 1848, and, if so, the Plaintiffs title not having accrued till *September* 1837, the time could not expire till the 16th of *September*, 1849, and, of course, the suit would have commenced in sufficient time not to fall within that Regulation.

With respect to this the facts stand thus :—

In 1847, the Respondent's father presented his petition to the Civil Court of *Chittoor*, for liberty to sue in *forma pauperis* for the recovery of this estate. The Court was of opinion that, under Regulation IV. of 1831, he could not be permitted to sue without first obtaining the authority of Government.

In *May*, 1848, he obtained the requisite authority, and on the 5th *October*, 1848, he and his son, the present Respondent, presented a petition for leave to sue in *forma pauperis* and at the same time presented their plaint in this suit.

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The rules of the Court require that for the purpose of obtaining such order the Plaintiff must make an affidavit of his circumstances, and a list of all his property, and produce a certificate of a *Vakeel* that he has a good cause of suit.

All the necessary documents accompanied the petition, and on the 13th of *November*, 1848, the following order was made by the Court.—“1848, 13th *November*. On a perusal of the pauper plaint and its companions put in by *Kooppay Naidoo* and another Petitioner in miscellaneous petition 631, and on taking from them the prescribed affidavit, the said bill of plaint, &c., were ordered to be filed.”

At this time, therefore, an order was made that the plaint to which an answer has since been put in, and upon which all the proceedings subsequently have taken place, should be received by the Court and put upon record. There seems strong ground for contending that this was the commencement of the suit; and the Court below, which must be the best judge of its own forms and practice, has held that it was so.

The practice is stated by Mr. *Macpherson*, at p. 85 of his valuable treatise, in these terms:—“The period of limitation ends on the day when the plaint is duly lodged by the complainant in a Court of competent jurisdiction, not on the day when the suit is placed by the *Sudder* Court upon the file of the Court, which they deem most proper to try it, nor upon the day when the plaint is numbered and sent for decision, for if there be any delay in that process, it is the delay of the Court, and not of the Plaintiff.”

But if the preferring of the plaint with the order of the Court of the 13th of *November*, 1848, be not the commencement of the suit, these facts clearly

bring the case within the exceptions found in the Regulation.

There seems reason to suppose that the proceedings adopted by the Court on the 13th of *November*, 1848, were irregular, and that on that day it ought, according to the Regulation VII. of 1818, to have ordered immediate service of the petition and of the plaint on the Appellant, and to have fixed a day for her to show cause, if she could, why the Plaintiffs should not be allowed to sue in *formâ pauperis*.

If this course had been adopted on the 13th of *November*, 1848, the order, which was actually made on the 1st of *March*, 1850, which the Appellant contends must be treated as the commencement of the suit, might, and probably would, have been made long within the prescribed period.

The order for service of the petition and plaint on the Appellant, and requiring her to show cause, if she could, why the Plaintiffs should not be allowed to sue in *formâ pauperis*, was not actually made till July, 1849. Service was made in *August*, and no cause was shown. The case, therefore, stood in this position on the 16th of *September*, 1849, when the twelve years expired: the Plaintiffs had preferred this claim within the prescribed period to a Court of competent jurisdiction, and had been prevented from commencing their suit in proper time (if, in point of fact, it was not commenced in proper time) by no neglect on their part, but by the irregular proceedings of the Court to which their claim was preferred.

It would be contrary to all reason and justice to hold that, under such circumstances, the Plaintiff's suit could be barred by the Regulation.

We must humbly advise Her Majesty to affirm, with costs the decrees complained of.

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... *Appellant*,

AND

HUREE PUNTH BHAO, SREE NEWAS }  
 RAO and BULWUNT RAO ... } *Respondents.\**

*On appeal from the Sudder Dewanny Adawlut,  
 North-West Provinces, Agra.*

25th, 26th,  
 27th, & 28th  
 June, 1862.

By the Hindoo law as administered in the north West Provinces, a Hindoo has power to make a testamentary disposition in the nature of a Will.

A disputed Will, made by a Hindoo, disposing of self-acquired estate among his family, established.

Charges of fraud, forgery and perjury

having been made by the Respondents against the Appellant, the party who propounded the Will, costs of the Courts in India, and upon appeal to England, were upon reversal of the decree of the *Sudder Court*, ordered to be paid by the Respondents.

THIS was an appeal and cross-appeal from a decree of the *Sudder Dewanny Court* at *Agra*. By that decree the Court reversed so much of the decree of the *Zillah Court* at *Cawnpore*, as sustained the Will, dated the 24th of *January*, 1852, of *Ram Chunder Punth, Soobadar*, formerly Resident of the military cantonments of the late *Peishwa, Sree Muhunt Bajee Rao*, at *Bhitoor* in the District of *Cawnpore*, the father of the parties to this appeal, but dismissed so much of the Respondents' claim as related to two villages,

\* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Ryan.

*Assessors* :—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

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named *Lalpoor* and *Bulwapoor*, in *Pergunnah Bithoor*, which they insisted were part of the estate of the Testator, but which the *Sudder Dewanny* Court held were the private estate of the Appellant, having been acquired by him by purchase out of his own moneys and formed no part of the Testator, *Ram Chunder Punth's* estate. A cross-appeal was by special leave (a) brought against this latter part of the *Sudder Dewanny* Court's decree, and also against so much of the same decree, as related to the valuation of the personal and immoveable property left by the deceased in case of his intestacy arrived at by the *Sudder* Court.

The Appellant was the eldest son of the deceased, and the Respondents his younger brothers.

The substantial questions raised and at issue in the appeal were, first, as to the power of a Hindoo to make a testamentary disposition in the nature of a Will, devising and bequeathing self-acquired property; and, secondly, the question of fact, upon the assumption of the existence of such power, whether the Will in question was sufficiently proved by the evidence in the suit, and was the free and voluntary act of the deceased. No objection was raised to *Ram Chunder Punth's* testamentary capacity.

In the view which their Lordships took of the evidence in respect to the validity of the Will, any further statement of the facts of the case are unnecessary; the evidence upon that point being fully stated and considered in the judgment of their Lordships.

Mr. A. Stephens, Q. C., and Mr. Edmund F. Moore, for the Appellant,

Insisted, first, that by the Hindoo law, the Testator

(a) 6 Moore's Ind. App. Cases, 464

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*Ram Chunder Punth*, had power to make a Will devising and bequeathing real and personal self-acquired estate, citing Sir *F. Macnaghten's* "Cons. on the Hindoo law," pp. 316, 318, 331, (a); and, secondly, that it was established by the evidence, which they fully investigated and commented upon, that the *Ram Chunder Punth* executed the Will in question.

The Solicitor-General (Sir *R. Palmer*) and Mr. *Leith*, for the Respondents,

Submitted, that the *onus probandi* was upon the Appellant, and that he failed to prove by evidence that the Will was executed by the deceased, and further, that if the *factum* of the Will had been proved, the Will was invalid by the Hindoo Law as laid down in the *Mitacshara*, which they insisted governed the case.

Mr. *A. Stephens*, Q. C., in reply.

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The consideration of their Lordships' judgment was reserved, and was now delivered, as follows, by

Lord KINGSDOWN :—

The question in the original appeal in this case is

(a) See also upon this point, *Strange's "Hindu Law,"* Vol. I., 254, *ib.* Vol. II., 438. *W. H. Macnaghten's "Prin. of Hindu Law,"* p. 3; *Steele's Law and Custom of Hindu Castes*, pp. 62, 375, 187, 237, 8. *Morley's Dig. tit. "Will,"* (b) p. 613, *ib.* Second series, p. 330; (a) *Juggomohun Ray v. Sreemutty, Clarke's Rules and Orders of the Supreme Court of Calcutta*, p. 105; *Ramtonoo Mullick v. Ramgopaul Mullick*, 1 *Knapp's P. C. Cases*, 245; *Rewum Persad v. Mussmat Radha Beeby*, 4 *Moore's Ind. App. Cases*, 137; *Baboo Janokey Doss v. Binabun Doss*, 3 *Moore's Ind. App. Cases*, 197; *Nagalutchmee Ummal v. Goppoo Nadaraja Chetty*, 6 *Moore's Ind. App. Cases*, 309; *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick*, 6 *Moore's Ind. App. Cases*, 526. and *post*, p. 123; *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee*, 8 *Moore's Ind. App. Cases*, 66; *Ben. Regs XXXVI. of 1793*, and sec. 6 of XLIV. of 1795

as to the genuineness of an instrument alleged by the Appellant to be the Will of *Ram Chunder Punth*, deceased, the father of the Appellant and Respondents; the Appellant being the eldest, and the Respondents the two younger sons of the alleged Testator. The *Zillah* Court of *Cawnpore* decided in favour of the Will. The *Sudder Adawlut* of the North-Western Provinces reversed that decision, but held that certain property which the Respondents alleged to be a part of their father's estate belonged to the Appellant.

Against the decision on this point, and against a determination of the Court with respect to the amount of the alleged Testator's property, with which the Appellant is to be charged, there is a cross-appeal by the Respondents.

*Ram Chunder Punth* in his lifetime was *Soobadar* an officer of rank and distinction in the service of the *Maharajah*, the *ex-Peishwa*. He had accumulated a large property, and had invested some part of it, not very considerable in proportion to the whole, in the purchase of land.

He had two wives and three sons, and at least one daughter. He had a residence at *Bithoor*, where he seems to have kept a large establishment of servants, and he had a smaller house—a *Bungalow*, as it was termed by one of the Respondents' Counsel, at *Cawnpore*—at the distant of about ten miles from *Bithoor*.

He appears to have lived on terms of great intimacy with many Europeans resident in his neighbourhood, and especially with Mr. *Morland*, an English gentleman who held some official situation at *Cawnpore*. It is in evidence in the case, that the

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eldest son, the Appellant, had the general management of his father's affairs, and that differences had prevailed in the family between the sons, the eldest, as it is said, acting with harshness towards his younger brothers.

The *Soobadar* died on the 22nd of *July*, 1853, and on the 10th of *August*, 1853, the Appellant presented a petition to the Judge of the *Zillah* of *Cawnpore*, in which he described himself as eldest son, heir, and executor of *Ram Chunder Punth, Soobadar*. The petition stated the death of the *Soobadar*, and that when in his perfect senses he constituted the Petitioner his executor and proprietor of his effects, under a Will signed and sealed by the deceased, and bearing date the 24th of *January*, 1852; that during the lifetime, and to the day of the death of the deceased, the Petitioner held possession of all the real and personal estate and effects, in subordination to the deceased, and regulated and managed all his affairs, as people generally were well aware of, and of which the Court was equally well informed. He then stated that he found that he could not realize the assets of the Testator without obtaining a certificate of administration under Act, No. 20, of 1841, and he prayed a certificate accordingly.

He appended to his petition the alleged Will, with translations in English and Persian, and added the names of the four attesting witness and two persons by whom the translations were alleged to have been made under the Testator's directions, one an European, named *Pownes*, and the other a Hindoo, named *Moheeoodeen*.

On the 12th of *August* the Respondents presented their petition, alleging that the Will was a fabrication of the Appellant, and that they were joint heirs with him.

• Witnesses were examined for and against the Will, though it is said that the Judge improperly declined to examine some persons who were tendered by the Respondents for examination; and on the 8th of *September*, 1853, he ordered certificate of administration to be granted to the Appellant.

On the following day, the 9th of *September*, the Respondents filed their plaint in the *Zillah* Court of *Cawnpore* against the present Appellant, claiming two-thirds of the property, real and personal, of their deceased father, from the Appellant.

Evidence was gone into on both sides, and of course it was for the Appellant to establish the Will. It purported to bear date the 24th of *January*, 1852. The effect of it, according to the English translation, as made in the *Zillah* Court, was to declare, that the Testator was seventy-five years of age; that his younger sons were childless. It then proceeded to express his hopes that his wives and his sons would all live amicably together, and that all would look upon and consider his eldest son as the head of his family after his death. He then bequeathed the whole of his property, real and personal, to his eldest son, directing him to provide for both his wives, and to pay them proper respect, and to provide also for his younger brothers, and for the Testator's dependents; and he declared that he had made these provisions with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease. If, however, the younger sons should not feel disposed to abide by these directions, and should insist on a separation from the family, then the eldest son was to receive the rents

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of two villages, mentioned in the Will, and pay over the proceeds to his younger brother, as such proceeds were, from time to time, received; and he was further to pay to each the sum of Rs. 25,000. The Testator then gave Rs. 13,000, for the benefit of his granddaughter, the daughter of the Appellant, on her marriage and allotted Rs. 40,000, for what he calls the customary outlay in the first year after his death, including religious pilgrimages.

In the event of a pension which he enjoyed from the British Government being continued to his family there is some question as to the effect of the bequest, the first English translation provides, that in whatever proportions the British Government might allot it, the sons should enjoy it.

The Testator's property has been estimated by the *Sudder Court* as of the value, in the whole, of 5 *lacs* of rupees, or in English money of £50,000. The value of the two villages given to the younger sons is estimated at £5,000; the two legacies of Rs. 25,000, would amount to as much more. They would take, therefore, £10,000; the granddaughter £1,300; the funeral and other expenses £4,000; and there would remain a sum of £35,000, for the eldest son, charged with the maintenance of the wives and dependents of the Testator.

There seems nothing in this Will which to English notions would appear unreasonable. The eldest son was to maintain the rank and position of the family; he had issue which the younger sons (who had arrived at the age of manhood and appear by the Will to have wives) had not, and the provision seems to be such as a prudent Testator might be supposed very likely to make who was inclined to found a family.

• The evidence in support of the Will is singularly strong. •

We have first the evidence of *Apa Lagoo*, who wrote the Will in the *Mahrattée* character. He says, "it is all in my handwriting down to the words indicating the Arabic month, at the end, which were inserted by the *So obadar* himself. The date is 2nd *Rubee-ool-Akhir*, and underneath it is written, *Magh Soodee Teej*, in my handwriting. Under that again is the *Soobadar's* signature. This Will was written under the *Soobadar's* orders. It was planned two days before, and it was reduced to writing on the 24th of the month." He then proceeds to depose to the signature of the Will, and its sealing by the Testator, and signature by the four attesting witnesses. He says that a draft of the Will had been previously made by him, the witness, and the draft, as well as the Will, was handed over by the Testator to the Appellant. He says that the two translations were made four days afterwards.

It was remarked upon as singular, that *Apa Lagoo* was not an attesting witness to the Will; but we agree with the observation of the Counsel for the Appellant in his reply, that, if the Will was not genuine, the person who had written it would most probably have been made a witness in order to make it more difficult for him to betray his employer.

This witness was in the service of the *Soobadar*, sixteen or seventeen years; employed in writing letters for him. He seems to give his testimony very fairly. He says that the Will was made in favour of the Appellant only because he was the eldest son, for the *Soobadar* was not displeased with the younger

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sons. He does not know whether the younger sons were informed of the Will or not; but they were not informed of it in his presence.

Three of the attesting witness to the Will, *Byjaba*, *Sookharam*, and *Dinkur Punth*, all give the same account of the transaction, not as we too often find in these cases, all in the same words, not, indeed, concurring in all the minute particulars of what passed, but with that agreement in substance and that variation in unimportant details which are usually found in witnesses intending to speak the truth, and not tutored to tell a particular story.

Now, who are the witnesses, and are they of a character to attach credit or discredit to their testimony.

The first witness is *Byjaba*. He says he was a companion of the *Maharajah* in his lifetime; that he had been in his service from the age of ten years; that he was in the habit of receiving presents of 500, 400, or 1,000 rupees from the *Maharajah*, and as a permanency the *Maharajah* allowed him 2 rupees a day. He says there was an intimate bond of brotherhood between the *Soobadar* and himself, and that the *Soobadar* sent a messenger in a carriage to *Bittoor* to fetch him to *Cawnpore*, in order that he might witness his Will.

This witness, therefore, appears to be a person in a very respectable position in life; a person likely to be called upon by the *Soobadar* to take the part which he did in the completion of this instrument. The only objection suggested to him is, that he appears to be indebted to the Appellant in a bond for Rs. 500, payable by instalments, a circumstance which cannot weigh much, if anything, against his evidence.

The next witness is *Sookharam*, who was in the service of the *Soobadar*, and received what we imagine is rather a considerable salary, Rs. 300 a-year, and held a confidential situation as keeper of the jewels. No objection was made to him except that he was now in the service of the Appellant.

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The next witness is *Dinkur Punth*, who also appears to be in a respectable position. He was a *Resaldar* in the *Maharajah's* employ, and received a salary of Rs. 300 per annum. After the *Maharajah's* death this salary was reduced by the *Soobadar* to Rs. 200, which he continues to receive from the Appellant.

The remaining attesting witness, *Kesho Rao*, had given evidence, like the others, in support of the Will on the application for the certificate of administration, and he was produced on the present occasion, by the Appellant, and came from *Bithoor* to give evidence, riding, as he says, a horse supplied by the *Nana Sahib*. Instead, however, of confirming his former testimony, he says, that the whole of it was false; that the Will was written by the Appellant himself, and that he, the witness, signed it fifteen days after the death of the *Soobadar*, and that when he gave his former evidence, he was brought into Court in a state of intoxication, having been drugged. This latter statement is manifestly false. He was examined and cross-examined on the former occasion in the presence of the Judge, and there are no signs at all of confusion in his testimony.

The reason of this man's thus contradicting his former evidence may be conjectured with great probability. He is a Brahmin, and it appears to be contrary to the tenets of the Brahmins that a person

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in the situation of the *Soobadar*, having several sons, should dispose of his property by a testamentary instrument in favour of one; they hold it to be contrary to the *Shasters*, as appears by the evidence given in this case by the Respondents. The witness says, "Since the month of *Kartik* last (he was examined on the 28th of *March*, 1854), all that Brahmins of my brotherhood combined and put me out of caste for giving such false evidence." He is asked by the Court, "How did the Brahmins learn that you had given false evidence?" He answers, "All the Brahmins are well aware that the Will is a fabrication; nor, indeed, is it the custom or usage of the country that three sons should be masters of the property and a Will be made in favour of only one son only without giving notice of the others."

All the circumstances lead to the conclusion that this witness is not coming forward to correct false evidence previously given, but that he has been tampered with, and, under the pressure of his brotherhood, is attempting to destroy an instrument which he knows and had originally declared to be genuine.

The *Zillah* Judge who saw the witness, and observed his demeanour during his examination, remarks, "I am bound to record the very unfavourable impression given by the manner and appearance of this witness, which was, it seemed to me, shared by all present." After referring to a description of the symptoms of a false witness contained in the *Mitacshara*, he says, "All these features of uneasiness were very visible and it seemed to me that he was in fear of some person in the body of the room who had been sent to watch his evi-

dence;" and he intimates "a strong suspicion that the venal perjury of this witness was mainly relied on to support the present suit."

There remain of the witnesses who have been previously examined, the two translators, as they are called, though that expression does not quite accurately express what they did, *Nusur Moheooddeen* and *Pownes*.

The former examined, and confirms in every particular his previous evidence. He says that two days before the end of *January*, what he calls the translation was made. The translation was made in this manner. The *Soobadar* held the *Mahrattée* Will in his hands, and dictated the terms of it in the *Oordoo* language, which the witness wrote down after him in the Persian character, and when this was done, the *Soobadar* signed it; that "the *Soobadar's* object in making this Will was solely to perpetuate his name and dignity and rank, and that the *Nana* might be enabled to protect and support other persons, for the *Soobadar* always spoke to that effect."

Mr. *Pownes* is not examined again, but his former deposition is put in, and what took place with respect to him is so extraordinary, with reference to the proceedings of both the *Zillah* and the *Sudder* Courts, that their Lordships think it necessary to call it to the attention of the Judges there.

The witness had been examined and cross-examined in the former proceedings, and had given a similar account of the transaction to be given by *Mohéeddeen*, viz., that the *Mahrattée* Will was held by the Testator, who read it and went on rendering it in *Oordoo*, while the witness wrote it out in English; that the witness did not take the original Will into

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his hands to inspect it, but it was on the table, and he should recognize it if he saw it. He does recognize it, and he says he first made a draft, which he afterwards fair copied, and the *Soubadar* wrote something at the bottom of it which must have been his signature, but the witness is not acquainted with that character.

On the 28th of *October*, 1853, the Appellant presented a petition to the Court containing the following statement: that Mr. *Pownies*, a clerk of the Judge's Office, and employed as English translator, had previously deposed on oath to the Will; that on the 22nd of the present month, six days ago, he had called at the Petitioner's house and proposed terms to the Petitioner connected with a pecuniary reward, which Petitioner declined; that two days afterwards he sent word to the Petitioner by a trustworthy man to say, that he would now give evidence of a different purport, and thus throw obstacles in the suit, if the Petitioner did not consent to his proposal. That on receiving this message the Petitioner was astounded, but that he had done his duty by reporting the circumstances to the Court.

When a charge of this most grave character was brought against an officer of the Court, placed in a situation of great importance to the due administration of justice, which, if the charge were true, he ought not to have been permitted for a single hour longer to retain, it would naturally be expected that a most strict inquiry would be immediately made by the Court into the truth or falsehood of this charge. Yet as far as we can discover, not the slightest notice appears to have been taken of it.

On the 17th of *November*, 1853, the petition con-

taining this charge was ordered to be filed, and on the 27th *January*, 1854, on the petition of the Appellant the deposition of *Pownes* to which we have already referred was ordered to be filed.

How it happened that if the Court did not think it necessary to investigate such a charge against one of its officers; that that officer himself did not immediately insist on having his character cleared, it is difficult to understand; something may have been done, and some explanation may have been given of which no trace is to be found on the record, but if this were so it is to be regretted that nothing of the sort appears.

The *Zillah* Judge does not seem to have adverted at all to the deposition of *Pownes*. The *Sudder Court* do observe upon it, but in terms not very accurate, according to the record as it appears before us; and they object to it only on a ground which is quite untenable, namely that the witness did not appear to have been sworn before he was examined, though the contrary appears upon the jurat signed by the Judge himself. They complain that he was not examined in the suit, but they do not take any steps for the purpose of remedying the defect, nor allude to any proceeding as having been taken or as being fit to be taken for the purpose of investigating a matter of so great importance to the due administration of justice as the charge of gross corruption brought against one of the officers of the Court of *Cawnpore*.

In addition to the witnesses to whom we have referred, speaking to the *factum* of the Will, there is other very important testimony in support of it. There is one person, *Baboo Porarkur*, whose evidence

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on this subject is of the greatest weight. If, he is to be believed, he proves the whole case; he says that he was not present when the Will was made; that he was detained at *Bithoor* by the death of his mother; that the *Soobadar* informed him of the Will soon after it was made on the 6th or 7th of *February*; that the Will was shown\* by the *Soobadar* to his younger sons, the Respondents, who took it up and read it and then laid it down near the *Soobadar*, who handed it to the Appellant. He says that those who live in the *Bara* (which we understand to be the mansion of the *Soobadar*) must all have been aware of the Will; that he was heard from *Nurain Rao Apa*, a grandson of the Testator, that Dr. *Cheek* and Mr. *Vincent* were aware of it; and he states as of his own knowledge, that Mr. *Kirk* of the Bank of *Cawnpore*, was also informed of it; and he refers to a letter, of which we shall have something to say presently. He says that he was always with the *Soobadar*, and acted in some respects as his deputy.

Now, not only is there no impeachment at all of this witness, but there is strong testimony in his favour. Mr. *Morland*, on whose evidence against the Will the greatest reliance is placed by the Respondents, refers to this person as the confidential agent and constant attendant of the *Soobadar*, and as one who would have been asked to attest the Will, if any Will had really been made by the *Soobadar*.

A sufficient reason why he was not asked to attest it, appears incidentally, on his examination, viz., that he was detained at *Bithoor* by the death of his mother.

This witness *Baboo Porarkur*, refers to Mr. *Vincent*, Dr. *Cheek*, and Mr. *Kirk*, as Europeans acquainted with the Will.

Now, with respect to Mr. *Vincent*, a letter of that gentleman, written to the Appellant at *Cawnpore* during the examination of the witnesses in the case, is found on the record. In the petition tendering the letter the Appellant says that Mr. *Vincent*, who is now in *Cawnpore*, is ready to attest the contents of it. It amounts, however, to very little, even if the contents were regularly proved, which they were not.

Dr. *Cheek*, a physician says, that in *February*, 1852, when he attended the *Soobadar* professionally, he had the following conversation with him:—"One day he was very ill, and I said to him, 'The state of your health is such that you should arrange your affairs, though I hope you will recover from your present illness.' To this he replied, 'I have arranged my affairs,' or words to that effect. He never made use of the term 'I have made my Will,' though I was led to suppose he meant this from the above expression he made use of."

This was very soon after the date of the alleged Will, and appears to their Lordships important confirmation of the truth of the Appellant's case.

The third European referred to by *Baboo Porarkur* is Mr. *Kirk*, of the Bank of *Cawnpore*. The communication to him is alleged to have been made by a letter signed by the Testator, which if it be genuine is admitted to be conclusive of the case.

This letter purports to have been written on the 9th of *January*, 1853, to Mr *John Kirk*, at that time superintendent of the *Cawnpore* Bank.

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It appears that the *Soobadar* had at some antecedent period taken ten shares in the *Cawnpore* Bank, and had had those shares entered in the name of his youngest son, the Respondent, *Hurree Punth Bhao*. The Bank, in 1852, was winding up its affairs, and was about to return by instalments their capital, or a dividend upon such capital, to the shareholders. The Appellant had applied, as the manager of his father's affairs, to the Bank for payment of Rs. 250, the dividend then payable. Mr. *Kirk*, the Superintendent, refused to act upon his statement without the authority of the *Soobadar*, and thereupon the following letter is alleged to have been signed by the *Soobadar*, and sent to Mr. *Kirk*:—

"Dear Sir,

"You have made an objection that the shares was held in the *Cawnpore* Bank by the name of my youngest son, *Hurree Punth Bhao*. Consequently you cannot pay the sum of Company's rupees (250), two hundred and fifty, to my eldest son *Nurain Rao Nana*, being the amount of refund capital at the rate of 25 rupees per share on the ten shares in the *Cawnpore* Bank, which it is now going to discharge. In reply, I beg to inform you that in those days when the shares was taken, my elder son, *Nurain Rao Nana*, was in preparation to proceed to England for some business on the part of the *Maharajah ex-Peishwa Bajee Rao*. Consequently for namesake the shares in question was taken by the name of my youngest son, *Hurree Punth Bhao*, otherwise the shares were taken by the name of my elder son. *Nurain Rao Nana* has full authority over all my property at present and also in future. Moreover, I have already written down my last Will and bequeathed to him. There

fore, I solicit your favour to remit the said amount to my elder son, *Nurain Rao Nana*, and also in future, whatever more shares will be liquidated on account of the said shares, kindly remit to my elder son, *Nurain Rao Nana*, and oblige

"Yours sincerely,

"*Ram Chunder Punth, Soobadar.*

"*Cawnpore, the 9th January, 1853.*"

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On the 19th of *January*, 1853, Mr. *Stacy*, who was then a clerk in the Bank, informed the Appellant, that Mr. *Kirk* had recognized his title, and had sent him a *hoondee* for the Rs. 250.

Mr. *Stacy's* letter is produced and is proved by himself, and is in these words:—

"My dear Sir,

"I am sorry Mr. *Kirk* will not agree to pay cash. He showed me your father's note, and he says he has now no further objection to recognize you as fully empowered to negotiate this business; but a *hoondee* is all he can give, and this for 250 rupees. I have accordingly the pleasure to inclose the same.

"Yours truly,

"*W. Stacy.*"

Now, Mr. *Stacy* is examined, and his evidence is very important. He says that the *Soobadar* called upon him in company with the Appellant; and after giving a history of the shares, told him that though the shares were in the name of his youngest son, yet his eldest son was proprietor and manager of all his affairs, and the proper person to receive the money (dividends), and he requested the witness to call on

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Mr. *Kirk* and get the money paid to the Appellant. He says that he had an interview with *Kirk* accordingly, who told him that he had received a letter from the *Soobadar*, and had no longer any objection to pay the dividends as requested, but could not pay cash; all he could do was to give a "*hoondie*" for the amount. Mr. *Kirk* read to him the *Soobadar's* letter, and he saw it too, but did not know the *Soobadar's* signature. He then verifies the letter which he had written, and looking at the other English letter addressed to the Bank, witness stated, that the contents of this letter were identical with those of the letter shown to him by Mr. *Kirk*.

It is clear, therefore, beyond all question, that some letter to the general effect of that stated by the Appellant was written by the Testator; that such letter had been sufficient to remove the difficulties felt by Mr. *Kirk*; and Mr. *Stacy*, on seeing the letter produced to him, declares the contents to be identical with that shown to him by Mr. *Kirk*.

It is said, however, that there is a passage in this letter which it is so improbable that the *Soobadar* should have written that it is in itself evidence of forgery. The passage is this:—"Nurain Rao Nana has full authority over all my property at present, and also in future. Moreover, I have already written down my last Will, and bequeathed to him."

But on full consideration of all the circumstances their Lordships are not able to agree in that view. As to the first sentence it amounts to little, if at all, more than what Mr. *Stacy* says that the *Soobadar* stated to him, and when it is recollected that the *Soobadar's* object was to settle the matter then in dispute, not only with respect to the dividends

then payable, but as to future payments ; that he was then seventy-six years old, and could not expect to continue much longer in life ; and that he could only perpetuate the authority of his son by making a Will, and, according to the hypothesis, had done so, there does not seem any great improbability in his stating this fact. It was not one which he was desirous of keeping secret from indifferent persons, and there was a motive on this occasion for communicating it. The letter was written in *January*, 1853, and Mr. *Stacy* speaks to its contents in *March*, 1854."

It is said, however, that the circumstances under which it is brought forward throw great suspicion upon it. To their Lordships, on the contrary, it appears that those circumstances almost exclude the possibility of forgery.

The account of the Appellant is this :—He had originally found a copy of this letter in his father's letter-book, and he took the book containing it to Mr. *Morland* in *October*, 1853. *Morland* says, he remembers forwarding a letter to the "Secretary of the Bank regarding payment of instalments which were due in the name of the *Soobadar*." Again, he says, "when I came to *Cawnpore*, in *October*, 1853, the Defendant brought me a book, containing a copy of a certain letter which Defendant told me had been addressed to Mr. *Kirk*, regarding refund of the instalments."

It may safely be assumed that the letter, a copy of which he thus showed, or offered to show, to Mr. *Morland*, was to the same effect with that now produced. It was said that the letter-book was not produced by the Appellant, but he had in his pleadings, tendered the production of it, and, the Re-

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spondents might, if they had desired it, have called for its production. The original letter itself was referred to in the hands of Major *Riddell*. •

Mr. *Kirk* was dead; his widow seems to have set up some business for herself, in which she employed a person named *Read*, as her clerk. Major *Riddell*, a Magistrate at *Cawnpore*, had undertaken to wind up the affairs of the Bank, and, of course, would have the papers of the Bank in his possession. The Appellant alleges, that he applied to Major *Riddell* for the original of this letter; that Major *Riddell* searched for, but could not find it, and suggested that it might be amongst the private papers of Mr. *Kirk* in the hands of his widow, and promised to write to her on the subject. It appears that he must have done so, for on the 17th *November*, Mrs. *Kirk*, having found the letter, sent it to Major *Riddell* by the hands of her clerk, *Read*, and Major *Riddell* indorsed on it, "Received from Mr. *Read*, this 17th *November*, 1853." The Appellant put in his answer on the 19th on *November*, 1853, in ignorance, as far as appears of the fact of this letter having been found; and on the 14th of *December*, he wrote to Mrs. *Kirk*, to inquire about this letter. On the 15th, she sent him this answer:—

"*Cawnpore*, *December* 15, 1853.

"Sir,

"In reply to your letter of yesterday's date, I beg to inform you that the letter I found from your father to my late husband has been duly forwarded by me to Captain *Riddell*, some time back, in order that the same might be made over to you."

The Appellant hereupon procured from Major *Riddell* a copy of this letter under his official seal,

and on the 26th of *December*, 1853, he put in his rejoinder to the Respondent's replication, in which he referred to this letter as then in the possession of Major *Riddell*, and to the letters of Mr. *Stacy* and Mrs. *Kirk*, as establishing its genuineness.

The persons here referred to, Major *Riddell* and Mrs. *Kirk*, were both resident in *Cawnpore*. Mr. *Morland*, who was a strong friend of the Respondent's, was probably also there; every opportunity was afforded to them of inquiring into the truth of the facts alleged, and of disputing the genuineness of the document, if any reasonable grounds existed for doing so.

On the 27th of *January*, 1854, the Appellant, by his petition, tendered in evidence a copy of the letter of 9th of *January*, 1853, referring to the original as in the hands of Major *Riddell*, and the two original letters of Mr. *Stacy* and Mrs. *Kirk*.

These documents were accordingly filed.

On the 29th of *March*, *Baboo Porarkur* was examined, and stated the circumstances relating to these *Cawnpore* Bank shares, and the effect of the letter written by the *Soobadar* on the occasion, which he says was, that the real proprietor of these shares was *Nurain Rao*, and that he, the *Soobadar*, had made a Will in his favour; he says that the letter was written by one *William*, who was occasionally employed as clerk in the house at *Cawnpore*, in English, at the *Soobadar's* dictation in his, *Porarkur's*, presence.

The Respondents, as it appears from the judgment of the *Sudder Court*, called for the production of the original letter in the hands of Major *Riddell*, and it was produced accordingly. An order for the pro-

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duction was made on the 29th of *March*, and though there is some confusion in the documents printed for the purpose of transmission to this country, and some orders are referred to in the index which are not printed, we think that it is sufficiently clear, independently of the statement by the Judges of the *Sudder* Court, that the original letter was produced in consequence of the order of the Court, and shown to Mr. *Stacy*, and on a subsequent occasion to Mr. *Morland*. No evidence whatever was given by the Respondents to impeach this document, nor were any questions put to any of the witnesses with a view to show any improper dealing with it by the Appellant.

If the statement thus given be true, and no attempt has been made to impeach it by any evidence, it is difficult to see how any opportunity of forgery was afforded to the Appellant. The objections made by the *Sudder* Judges to it are of no weight; one is that the Appellant, in setting out the copy of the letter, had not stated the indorsement made by Major *Riddell* of the day on which he had received it; the other, that *Read*, the messenger who carried the letter to Major *Riddell*, had, fifteen years before, been convicted of fraud, and sentenced to imprisonment.

In addition to all this evidence, there was proof by a grandson of the *Soobadar* that the 'Will' was known in the family, and had been the subject of conversation in the *Soobadar's* house in his lifetime, and this was confirmed by the testimony of several other witnesses.

Against this mass of evidence there was really no testimony entitled to any weight. The strongest

evidence against the Will is that of Mr. *Morland*, a gentleman of position and respectability; he says that he often suggested to the *Soobadar* the propriety of making a Will, observing that his late master, the *ex-Peishwa* had made one; but the *Soobadar* always (as he terms it) scouted the idea, saying, "Why should I make a Will?—there are my sons to inherit my property." This witness says, that he was on terms of such close intimacy and confidence with the *Soobadar*, that he is firmly persuaded that if the *Soobadar* had made a Will he would not only have consulted him about it, but asked him to be a witness.

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But there appears upon this gentleman's own depositions quite sufficient reason why the *Soobadar*, whatever might be his general confidence in him, should neither consult him about his Will, nor ask him to be witness to it, nor inform him that he had made it. Mr. *Morland*, it is clear, in the differences which prevailed in this family, supported the cause of the younger brothers, and was anxious to protect their interests against the elder, towards whom, whether with or without reason, he entertained feelings of dislike. He not only says, that he advised the *Soobadar* to make a Will, because he thought the Appellant was likely to claim much more than his share of his father's property after his death, and would do much to the prejudice of his younger brothers' but he admits that he had, on one occasion, at the instance of the second son, represented to the *Soobadar* the alleged tyrannical conduct of the Appellant. The *Soobadar*, on that occasion, said he had an equal regard for all his sons, but did not admit the tyranny imputed to the eldest.

Now, if the Testator was determined to leave to

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his eldest son the bulk of his estate, it was very likely that he would not communicate to Mr. *Morland* a determination so little in accordance with his advice or his wishes, or ask him to authenticate the instrument.

The other evidence is hardly deserving of notice ; it is disbelieved by the *Zillah* Judge, and is not adverted to by the *Sudder* Court. It consists of that sort of testimony with which, in these Indian cases, we are unfortunately too familiar—of witnesses who swear positively to matters of which they can have no knowledge ; of witnesses who swear that they have heard the alleged Testator, after the date of his Will, declare that he had never made one ; that they had heard the persons who had been parties to the instrument gratuitously declare to them that it was a forgery ; of witnesses who declare that they had been solicited by the party in the cause, or his agents, to attest instruments, which they were told at the same time were fabricated. Witnesses of this description may be had, unhappily for India, in any number in that country.

The two wives of the *Soobadar* are examined as witnesses against the Will, but they really say nothing, nor, indeed, are asked anything that is important ; each says in general terms, that the *Soobadar* never wrote anything in favour of any of his sons, and made no one proprietor ; and that he regarded all his sons as equal, and each says the whole property of the *Soobadar* belongs to her. They are examined as to the property, with respect to which they may be able to speak. Other witnesses give their opinion as to the handwriting of the Testator, a species of evidence seldom of much value in contradiction to

positive testimony, and in this case rendered of still less value, as to some of the witnesses, by the circumstance that they deny the handwriting of the Testator to documents admitted to be genuine. The rest of the evidence consists of the testimony of Pundits, who say that the *Soobadar* was always obedient to the *Shasters*, and that the *Shasters* forbid a father who has several sons to appropriate by Will to one the property which by law ought to be equally divided amongst all. It is clear that in this District a strong feeling prevails amongst the Brahmins upon the subject of testamentary disposition, which, though at length established by law as to self-acquired property, is opposed to the ancient usages and feelings of the country.

On the whole, it appears to their Lordships that the Appellant has sufficiently established his case. A course was taken in the *Sudder* Court, which is certainly unusual. The Judges ordered a translation to be made into English of the *Oordoo* Will, and they found that such translation did not, in form or in the order of the sentences, correspond in all respects with the translation made by *Pownes*, and from this, if we understand the meaning of the Judge who adverts to the fact, they drew an inference unfavourable to the Will. It may be observed that Mr. *Morland*, on being shown the English translation alleged to have been made by *Pownes*, says he has no doubt it is *Pownes's* writing. If any inference against the validity of the Will were to be drawn from the discrepancy between the two English translations, that discrepancy should have been called to the attention of the Appellant, and *Pownes* should have been further examined on the matter. The circumstance would have deserved

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attention if *Pownes's* translation had been made from a written copy of the *Oordoo* Will, but it was not. It was translated, as we have already said, into English, from sentences read in *Oordoo* by the Testator from the *Mahrattée* Will, and the discrepancies, such as they are, appear to us to be fully accounted for by this circumstance.

We think the circumstances of the case are strongly in favour of the Will. It contains such a disposition of the property as it was extremely probable that the Testator should make, and extremely unlikely that the Appellant should introduce into a forged instrument. The Testator was of great age. He had placed his eldest son in his place with respect to the management of all his affairs in his lifetime. He might, very naturally, desire to keep together in his family the wealth which he had acquired by his own exertions, and to prevent its dispersion by division amongst his sons. His eldest son had issue, his other sons had none; and he had the example of his master, the *Peishwa*, to follow, who had adopted a son and made a Will in his favour. The witnesses in favour of the Will are in general less open to exception than is usual in Indian cases, and some of them entirely unexceptionable. The *Zillah* Judge who has seen them has come to an opinion in favour of the Will, and appears to doubt whether the opposition to it is really the spontaneous act of the Respondents.

Their Lordships are of opinion, that the reasons assigned by the *Sudder* Court for its judgment are quite unsatisfactory. The view which they take of the original appeal makes any consideration of the cross-appeal unnecessary. It must of course be dismissed. They must humbly advise Her Majesty to reverse

the decree of the *Sudder* Court on the original appeal, and to restore that of the *Zillah* Court; and considering that the Respondents' case is founded on an allegation of fraud, perjury and forgery, which, in their Lordships' opinion, fails, they think they cannot do justice without advising, that the Respondents should be ordered to pay all the costs of the suit in both Courts below, and of both the appeals to Her Majesty.

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SREEMUTTY SOORJEMONEY DOSSEE ... *Appellant*,

AND

DENOBUNDOO MULLICK and others ... *Respondents*.\*

*On appeal from the Supreme Court at Calcutta.*

**T**HIS was a suit brought by the Appellant against the Respondents, claiming as the sonless widow, heiress, and personal representative of *Surroopchunder*

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\* *Present* : Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

*Assessors*.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

There is nothing in the general principles of Hindoo law, or public convenience, to prevent a Hindoo Testator devising self-acquired property by way of re-

mainder, or executory devise, upon an event which is to happen on the close of a life in being.

The Will of a Hindoo Testator, after devising all his real and personal estate among his five sons (a joint undivided family) contained this clause : "Should any among my said five sons die, not leaving any son from his loins, nor any son's son, in that event neither his widow, nor his daughter, nor his daughter's son, nor any of them, will get any share out of the share that he has obtained of the immoveables and moveables of my said estate."

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*Mullick*, deceased. The Appellant, by the bill, sought to recover her deceased husband's one-fifth share of and in the surplus income of the joint family estate, with the accumulations; which estate was held by his surviving brothers, or their descendants, as members with *Surroopchunder Mullick*, of a joint undivided Hindoo family, subject to the trusts, conditions, and limitations contained in the Will of the late *Bustomdoss Mullick*, the father of *Surroopchunder*; the Appellant also claimed to be entitled to a legacy of Rs. 10,000 under the Will, bequeathed to such of the widows of the Testator's sons as should have no sons, for food and raiment.

The principal questions raised in the suit had reference to the construction and effect to be given to the above Will, and to the rights of the sons and their sonless widows, and especially as to the Appellant's claim as heiress of her husband *Surroopchunder Mullick* to one-fifth part or share of the accumulations of the proceeds and profits of the estate and property, during

In that event of the said property, such of my sons and my son's son as shall then be alive, they will receive that wealth according to their respective shares. If any one acts repugnant to this, it is inadmissible. However, if my sonless son shall leave a widow in that event she will only receive Co.'s Rs. 10,000, for her food and raiment." The family remained joint. S., one of the sons, died after the Testator's death, without issue male, but leaving a widow, his heiress-at-law. Held, that by the words "not leaving any son from his loins, nor any son's son," the Testator meant, not an indefinite failure of male issue, but a failure of male issue of any one of his sons at the time of the death of that son.

Held further (1), that upon the death of S., without issue male, his interest in the capital of the estate determined, and that his widow became entitled to hold and enjoy as a Hindoo widow, a fifth part of the accumulations from the Testator's estate, from the time of his death to the death of his son; S.; and (2), that she was also entitled absolutely in her own right, to the interest and accumulations which had since S.'s death arisen from such fifth part of the accumulations.

By the decree, S.'s widow was declared entitled to the Rs. 10,000, given by the Will, with the benefit of a residence in the family dwelling-house, and participation in the means of worship. The question of the amount of her maintenance as a Hindoo widow was left open by the Judicial Committee, as that point could be raised on further directions after taking the accounts.

the lifetime of her husband, which had been treated as an increment to the original corpus of the share, and as passing with it to the surviving brothers of the *Surroopchunder Mullick*, under the Will. These questions were argued on the hearing of a previous appeal to set aside two orders of the Supreme Court allowing two demurrers for want of equity to the Appellant's bill, and it was then held by their Lordships that, under the limitations in the Will, *Surroopchunder Mullick's* one-fifth share in the family property went over, on his death, to his surviving brothers, but that the Appellant, as his widow and heiress-at-law, was entitled to the accumulations of income which had arisen from her husband's share of the Testator's estate during his lifetime. The facts and circumstances respecting the Will are fully stated in the report of the case in 6 Moore's Ind. App. Cases, p. 526, upon the hearing of the appeal from the demurrers, and require now only a brief outline of what occurred subsequently in India.

The Testator, *Bustomdoss Mullick*, by the first clause of his Will devised his self-acquired real and personal estate, among his five sons. Clause II, upon the construction of which the questions in this appeal rose, was as follows:—"The *Issore* avert, but should peradventure any among my said five sons die, not leaving any son from his loins, nor any son's son, in that event neither his widow, nor his daughter, nor his daughter's son, nor any of them will get any share out of the share that he has obtained of the immoveables and moveables of my said estate. In that event of the said property, such of my sons and my sons' son as shall then be alive they will receive that wealth according to their respective

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shares. If any one acts repugnant to this it is inadmissible. However, if my sonless son shall leave a widow, in that event she will only receive Company's rupees (10,000) ten thousand, for her food and raiment."

By an order of Her Majesty in Council, the orders of the Supreme Court made upon the demurrers filed in the suit were reversed, and the demurrers overruled.

On the receipt of this order in India, the Respondents filed their answer in the suit so instituted, whereby they admitted the principal allegations in the bill as to the Will of *Bustomdoss Mullick*, and that the family lived after his death as a joint undivided Hindoo family, and also as to there being a large surplus of income over expenditure.

On the application of the Plaintiff, as a Hindoo lady of rank, a commission to examine her as a witness on her own behalf was issued, and her evidence was taken thereunder, by which she deposed, that she was excluded against her will from the family house in which she and her husband had lived. The Defendants examined two witnesses; one, the Respondent, *Brijobundoo Mullick*, who deposed to the mode in which the family accounts were kept, showing that all items of expenditure were borne by the joint family, even for individual members; and another witness, named *Rajender Dutt*, who, as member of a joint Hindoo family, was called to prove what the custom of joint Hindoo families were, but he was unable to prove any fixed and established custom as to joint families not having separate expenditure for individuals.

The suit came on in the Supreme Court, and

was heard before the Chief Justice, Sir *Barnes Peacock*, Sir *Charles M. R. Jackson*, and Sir *Mordaunt L. Wells* Puisne Judges. At the hearing it was submitted on behalf of the Appellant that her husband, notwithstanding the Will of *Bustomdoss Mullick*, was entitled absolutely to one-fifth of the corpus as well as of the accumulations; while, on the part of the Defendants, it was contended, not only that by the Will, *Surroopchunder Mullick* having died without male issue, his widow was excluded from all share in the corpus; but that by the Hindoo law governing families living jointly, as theirs did, the increment followed, and was blended with and became distributable in the same manner as the corpus; and that *Surroopchunder Mullick*, while so living in joint estate, must be considered as waiving his right to enjoyment in severalty of that portion of the estate which, under his father's Will, he would, if a partition had taken place, have been entitled to, and as having elected to take, in place thereof, the advantages which, in case he or his male issue had survived any of his brothers who should have died without male issue, might and would have accrued to him, *Surroopchunder Mullick*, or his male issue, by reason of the share of the brother or brothers so dying, of the accumulations becoming distributable in the same manner as the corpus, under the terms of their father's Will: and the Respondent, therefore, submitted, that the Appellant was bound by the acts and conduct of *Surroopchunder Mullick*, and was not entitled to set aside an understanding and arrangement founded, as they alleged, on good consideration, and in accordance with Hindoo law and the custom of Hindoo families, and so long and uniformly acted on by

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*Surroopchunder Mullick*, together with his brothers, in his lifetime, as to render impossible the proper taking of the account which the Appellant sought to reopen; and that she was not entitled to any portion of the relief which she prayed, except the payment of the legacy

The opinion of the Court was delivered by Sir *Barnes Peacock*, as follows:—"In this case, the first question that arises is, whether the Plaintiff is entitled under the Will to her husband's share in the corpus of the joint estate. Only one of the three learned Counsel for the Plaintiff has argued that she is so entitled. Assuming that the judgment of the Privy Council is not conclusive on the question, let us see what was the intention of the Testator. The first clause of the Will gives all the property, moveable and immoveable, to the five sons, but the gift is defeated by the eleventh clause.—[The learned Judge read the clause, *ante*, p. 125, and proceeded.]—Only one learned Counsel for the Plaintiff argued in support of the position that the Plaintiff took her husband's share of the corpus. He contended that, according to English law, the gift over would create an estate tail in real property and an absolute interest in personalty. That might have been so as to real estate under the law as it stood before the Wills Act, but not so as regards personal estate; and, according to Hindoo law, there is no distinction between real and personal estate. There was an absolute gift to the four sons under the first clause of the Will. The words of the eleventh clause, 'Should any of my sons die not leaving any son, &c.,' would not, even according to the old law, have imported an indefinite failure of issue in the case of personalty, but at most merely a

failure of issue at the time of the death of the son. The limitation over was, therefore, valid as an executory bequest, and there was no necessity for any implication. Furthermore, there is no such estate known in the Hindoo law as an estate tail. The next question is, does the husband's share of the accumulation pass to his widow? It is admitted that the brothers continued joint, that all expenses were charged to the joint estate, and that the annual income and profits exceeded the disbursements. The Privy Council have held that the accumulations do not pass with the corpus under the executory bequest; but it has been contended, on the parts of the Defendants, that they should go with the corpus, under a contract to be inferred from the act of the parties in having carried the accumulations to the credit of the estate. It must, however, be first shown that, in having carried the accumulations to the credit of the estate, the parties intended an alteration of their rights; this has not been shown, and is not to be inferred from the evidence. It has also been said that the parties believed that the accumulations followed the corpus; if they believed this, why should they have contracted to treat the accumulations as forming part of the corpus, which we are asked to infer that they did. The Plaintiff is not entitled to any share of the corpus, but she is entitled to a share of the accumulations, together with a share of the profits (if any) made thereon."

The following decree was made in the cause.—  
 "Declare that the Plaintiff, as the widow and immediate heiress and representative of *Surroopchunder Mullick*, deceased, is entitled, for and during the term of her natural life, to one equal fifth part or share of

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and in the accumulations which accrued during the lifetime of *Surroopchunder Mullick*, from or in respect of the joint estate which was of *Bustomdoss Mullick*, deceased, the Testator in the pleadings named, and to one equal fifth part or share of the interest and other profits, if any, which have been made or received since the death of *Surroopchunder Mullick*, from the accumulations which, as aforesaid, accrued during his lifetime from or in respect of the joint estate, to be held, possessed, and enjoyed by her as a Hindoo widow, in the manner prescribed by Hindoo law. And this Court doth further declare, that under the last Will and testament of *Bustomdoss Mullick*, the Plaintiff, as the widow of *Surroopchunder Mullick*, is entitled to received, out of the joint estate, the legacy of Co's Rs. 10,000; and Counsel for the Defendants not objecting, this Court doth order that the Accountant-General and sub-treasurer for the time being of the Government of India, with the privity, of the Accountant-General of this Court, do pay, indorse, and deliver over, for the Plaintiff, in full of the legacy of Co's Rs. 10,000, the Government securities and cash balance paid into Court to the credit of this cause, under an order bearing date the 28th of July, 1856, together with all accumulations of interest accrued due thereon. And this Court doth further order, that it be, and it is hereby, referred to the Master of this Court, to take an account of the joint estate, movable and immovable, as the same stood at the time of the death of the *Bustomdoss Mullick*, and also an account of the joint estate as the same, with accumulations thereof, stood at the date of the death of *Surroopchunder Mullick*, and also an account of the joint estate as the same,

with the subsequent accumulations thereof, stands at the present time; and the Master, in taking the account, is to make to all parties all just allowances and, for the better taking of the same, all parties are to produce before the Master, on oath (if required), all books, accounts, papers, and writings, in their or any or either of their hands, custody, power, or control, or in the hands, custody, power, or control of their or any or either of their servants or agents, relating to or in any way touching or concerning the matters hereby referred to the Master; and the Master is to be at liberty to examine upon oath, on interrogatories, or *viva voce*, the parties, Plaintiff and Defendants, and to examine upon oath such witnesses as shall for that purpose be produced before him by any or either of the parties to the suit; and, Counsel for the Defendants not objecting, this Court doth order that the Plaintiff be at liberty during her life to reside in the family dwelling-house of the Testator, and occupy the rooms which were occupied by her and her late husband in his lifetime, and be also at liberty to attend the performance of the worship of the family idol. And this Court doth further order, that the Defendants, *Denobundoo Mullick*, *Brijobundo Mullick*, *Toolseedoss Mullick*, and *Soobuldos Mullick*, do pay to the Solicitors of the Plaintiff her costs of and incidental to this suit, up to and including this decree, when such costs shall have been taxed by the taxing officer of this Court, to whom it is hereby referred to tax the same. And this Court doth reserve the consideration of all further directions, and of the subsequent costs of this suit, until after the Master shall have made his report; and, in the meantime, all parties are to be at liberty to apply to this Court,

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from time to time, as they may be advised, and this decree is to be binding on the infant Defendant, *Koonjoobeharry Mullick*, unless he, being served with a subpoena to show cause against the same, shall, within six months after he shall attain his full age, show unto this Court good cause to the contrary."

The present appeal was from this decree.'

The Solicitor General (Sir *R. Palmer*), Mr. *Rolt*, Q. C.; and Mr. *W. Pearson*, for the Appellant.

The point determined upon the previous appeal (a) on overruling the demurrers had reference to the Appellant's right of accumulations of the income which had arisen from her husband's share of the Testator's estate during his lifetime. The question, whether she was also entitled to the corpus of that share, was not then determined, and is now open upon this bill, notwithstanding the decision of this Court on the demurrers. By the Hindoo law as received in *Bengal*, only such an alienation as might be made *inter vivos* by gift, would be good by a Will of a Hindoo, as he cannot alter the character of the estate, *W. H. Macnaghten's* "Princ. of Hindu Law," Vol. I. p. 4; *Strange's* "Hindu Law," Vol. I. pp. 130, 265-6-7; *ib.* Vol. II. pp. 419, 428, 435. Although it is true by latter authorities it has been held, that a Will may be made by a Hindoo, yet it is admitted that the extent of the power of disposition by a Hindoo Testator is regulated by the Hindoo law, and must be in accordance with the rights of his family under that law, *Nagalutchmee Ummal v. Gopee Nadaraja Chetty* (b), *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee* (c), The first clause (a) 6 Moore's Ind. App. Cases, 526. (b) *Ib.* pp. 309, 345, (c) 8 Moore's Ind. App. Cases, 66.

of the Will, if it be rightly interpreted as a bequest of the property, and not as a recognition of the rights which the Testator's sons, as his heirs, had, according to Hindoo law, is an absolute gift by the Testator of the whole of his estate, both real and personal, to his five sons, in equal shares. The eleventh clause is not sufficiently clear and unambiguous, to limit such absolute estate to an estate for life, on the contingency of a son dying without a son, or a son's son. Our contention is, that on the death of the Testator the Appellant's husband was entitled absolutely to one-fifth part of the estate, and not merely to a life interest therein, and that the Appellant, as his widow and legal personal representative, is entitled to that share, together with the additions and accumulations thereof made between the death of the Testator, and the death of her husband, to be held by her for life, as a Hindoo widow, who has by the Hindoo law a mere usufructuary inheritance in her husband's estate; *Strange's* "Hindoo Law," Vol. II. p. 251; *W. H. Macnaghten's* "Princ. of Hindu Law," Vol. II. p. 33. At all events, we submit that the decree of the Court below is wrong, as the Appellant ought to have been declared entitled absolutely, and not merely during her life, to all the income which since the death of her husband has arisen, or may hereafter arise during the Appellant's life as well from the accumulations, as from the capital of the share to which she is entitled; but if it should be determined that her husband took only a life interest in the one-fifth part of the corpus of the estate, then the decree ought to have declared that the Appellant as *Surroopchunder Mullick's* widow, was entitled to a proper sum by way of maintenance, consistent with her position in life, and the wealth whereof

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her husband was possessed, out of the joint estate, to enable her to perform the religious acts required by the Hindoo law, in addition to, and independently of the legacy of Rs. 10,000, bequeathed her by the Will for her food and raiment; *W. H. Macnaghten's* "Princ. of Hindu Law," Vol. II. pp. 117-9, *Strange's* "Hindu Law," Vol. I., p. 63.

At the conclusion of the Appellant's argument

The Lord Justice KNIGHT BRUCE,

On the part of their Lordships observed, that upon one point, probably the principal point in the case, their Lordships did not consider it necessary to hear the Counsel for the Respondents. His Lordship then proceeded as follows:—The chief question is, as to the meaning and effect of a certain provision contained in the Will of the Testator, *Bustomdoss Mullick*, first, what was the sense, and next, is the Will (duly construed) at variance with Hindoo law? By the first clause of the Will the Testator, mentioning his five sons, one of whom has since died, and whose share of the property is now in dispute, gives them, in effect, all his property, in such a way as, if there were no more in the Will, would make them absolute owners of it. But in a subsequent clause (the eleventh) the Testator says—[His Lordship read the clause, *ante* p. 125, and proceeded]—A controversy has been raised whether, according to the true meaning of his eleventh clause, the Testator points to an indefinite failure of male issue of any one of his sons whose male issue should fail, or failure of male issue at the time of his death. Their Lordships, taking the Will to have been translated accurately, as it seems admitted on all hands to be, consider it to be perfectly plain that that to which the Testator

here points is not an indefinite failure of male issue, but a failure of male issue of any of his sons at the time of the death of that son. This happened in the case of the son, *Surroopchundar Mullick*, who died without leaving male issue living at that time. Accordingly, an event has happened that the Testator pointed out. The question then is, whether the Hindoo law prohibits such a provision.

Whatever may have formerly been considered the state of that law as to the testamentary power of Hindoo over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law in allowing a Testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognised in practice. The law of India, at least the law of *Bengal*, has long been administered upon that basis, and the very mode in which this suit has been framed, and the manner in which it was conducted in India, are evidence, if evidence were wanting, that such is the general opinion entertained in *Bengal*. Their Lordships, therefore, being of opinion, as has already been stated, that according to the true meaning of this Will the property was given over upon an event

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which was to take place, if at all, immediately on the close of a life in being at the time when the Will was made, and seeing that that event has happened, consider that the Testator, in making this provision, did not infringe or exceed the powers given him by the Hindoo law, and that the clause effectually gives the corpus of the property to the surviving sons immediately on the death of that son who died without leaving male issue. To that question, therefore, the Respondents' Counsel need not address themselves. The question or questions as to the accumulations; interest, and maintenance, they will be so good as to address themselves to.

Sir *Hugh Cairns*, Q. C., for the Respondents:—May Lords, I might, perhaps, respectfully beg to be informed, whether by the word "accumulations" your Lordships referred to the same question as "maintenance."

The Lord Justice KNIGHT BRUCE :

Accumulations, interest, and maintenance; every question, in short, except as to the title to the mere corpus.

Sir *Hugh Cairns*, Q. C., and Mr. *Leith*, for the Respondents, were heard upon this point.

A Hindoo widow can only claim maintenance out of the estate left by her husband when it devolves on preferential heirs, but in this case, the decree appealed from, declares the Appellant to be the immediate heiress of her deceased husband, and as such entitled to the whole of the property left by him, and in one of the averments in the bill, she estimates the accumulations at Rs. 3,50,000, to be enjoyed by

her as a Hindoo widow. Maintenance is a claim on the estate which has been given over by the Will, which fixes her maintenance at a sum of Rs. 10,000, and she claims that legacy, and we submit, by accepting that sum under the Will, bequeathed expressly for food and raiment, she is estopped from claiming any other sum out of the Testator's estate, even if she was otherwise entitled. The fact of the Appellant's succeeding to property as widow and heiress of her deceased husband prevents any claim attaching on the estate of the Testator, even if she had not been expressly excluded from the same by the terms of the Will. Indeed, no claim for maintenance, beyond the claim for the legacy, was mooted in the Court below. If necessary, she may raise the point of maintenance when the cause comes before the Court below on further directions when the account is taken.

The Lord Justice KNIGHT BRUCE :

Their Lordships are of opinion, that the declaration in the decree may be with propriety varied in the manner to be now read ; as to which, however (though it is probably more a matter of form than of substance), their Lordships will readily listen to any observations that Counsel may wish to make. Their Lordships propose to report to her Majesty, that the declaration in the decree of the Supreme Court at *Calcutta*, of the 25th of *August*, 1859, in the words following, namely :—This Court doth “declare that the Plaintiff, as the widow and immediate heiress and representative of *Surroopchunder Mullick*, deceased, is entitled, for and during the term of her natural life, to one equal fifth part or share of and in the accumulations which accrued during the lifetime of

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*Surroopchunder Mullick*, from or in respect of the joint estate which was of *Bustomdoss Mullick*, deceased, the Testator in the pleadings named, and to one equal fifth part or share of the interest and other profits, if any, which have been made or received "since the death of *Surroopchunder Mullick*, from the accumulations which, as aforesaid, accrued during his lifetime from or in respect of the joint estate, to be held, possessed, and enjoyed by her as a Hindoo widow, in the manner prescribed by Hindoo law," be omitted, and that it ought instead to be declared, that according to the true construction of the Will of *Bustomdoss Mullick*, *Surroopchunder Mullick* became and was entitled to one equal fifth part of the estate, movable and immovable, of *Bustomdoss Mullick*, but that such title was defeasible; nevertheless, upon the event of his death without leaving any son, or son's son, then living:—And that it ought further to be declared, that *Surroopchunder Mullick* having died without leaving any son, or son's son, his interest in the capital of the estate determined upon his death. But that it ought to be also declared, that *Surroopchunder Mullick* was at the time of his death entitled, and that the Appellant, as his widow, heiress, and representative, is now entitled to one equal fifth part of all accumulations which arose from the estate of *Bustomdoss Mullick* from the time of his death to the time of the death of *Surroopchunder Mullick*, the part to which the Appellant is so entitled to be held, possessed, and enjoyed by her as a Hindoo widow in the manner prescribed by Hindoo law. And that it ought to be declared, that the Appellant is entitled absolutely in her own right to all such interest and accumulations as, since the death of *Surroopchunder Mullick*, has or have arisen

from the one-fifth part of the accumulations to which she is before declared to have been entitled.

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There remains the question of maintenance. It may be that the decree in its present shape, varied only in the manner which has been mentioned, decides and settles that question, whether on the ground of the Appellant having received the Rs. 10,000, given by the Will, and taken the benefit of a residence and participation in the means of worship which the decree mentions, or otherwise. If that is the effect of the decree, their Lordships are not disposed to interfere with it. They see no ground on which the Appellant can claim that interference; and, on the other hand, if the decree leaves the point open, leaves room for an application which, upon the state of the accounts as they shall ultimately appear, or otherwise, it may be reasonable to make consistently with the decree, their Lordships do not desire to interfere with that. They leave the matter as it is.

Then with regard to the costs. It is true that the decree will be to some extent altered; but, as to the main point of the contention, the appeal fails. It can hardly be said to succeed on any point, notwithstanding the slight alteration in language. And they see no reason why, in addition to the heavy costs which this lady heretofore has—their Lordships do not say improperly—occasioned to the estate, the costs of this appeal should also be thrown upon it. Their Lordships are of opinion that the costs of this appeal must be borne by the Appellant.

Does any observation occur to the Counsel upon the proposed alteration?

The Solicitor-General.—None occur to me, my Lord.

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Mr. *Leith*.—None, my Lord, to me.

The Lord Justice KNIGHT BRUCE.—The Counsel, of course, will understand that we leave the declaration as to the right of the Appellant to receive the legacy of Rs. 10,000, to have such effect as it may. There is no doubt, we suppose, that the accounts directed by the decree which we leave untouched, will bring out the whole condition of the estate, and enable the declarations to be carried into effect.

Mr. *Leith*.—I believe so. I believe that we take every account necessary to raise the question of maintenance.

GOBIND CHUNDER SEIN

*Appellant,*

AND

VALENTINE RYAN, and on his de-  
cease, the Administrator-General<sup>1</sup>  
of Bengal ...

*Respondent.\**

*On appeal from the Supreme Court at Calcutta.*

4th & 5th  
Dec, 1861.

The Fac-  
tors Act, 5th  
& 6th Vict.  
c. 39, is ex-  
tended to  
India, by the  
Act of the  
Indian Legis-  
lature, No.  
XX. of 1844.

TROVER by the Appellant against one *Ryan*, to recover the value of seventy-five bales of twist.

The case turned entirely upon the question, whether

\* Present: Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

*Assessor*.—The Right Hon. Sir Lawrence Peel.

A *Baniam*, or agent, was entrusted by his principals with a bill of lading for a particular purpose, and he pledged the same, *malâ fide*, without the consent of his principals to a native Banker, for advances made to himself.

a pledge made by one *Denonauth Sein*, as *Banian*, or agent, of the firm of *Gouger, Jenkins, & Co.*, with the Appellant was protected by the operation of the Act of the Indian Legislature, No. XX. of 1844, which extended the Factors Act, 5th & 6th *Vict.* c. 39, to India.

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The facts of the case were these :—

*Ryan*, in the month of *August*, 1857, was the master of the ship "*Aurora*." The firm of *Gouger & Co.*, of *London*, in that month shipped seventy-five bales of twist on board that ship, then bound from *London* to *Calcutta*, under a bill of lading, making the twist deliverable to Messrs. *Gouger, Jenkins, & Co.*, merchants and agents of *Calcutta*, or their assigns, as consignees for sale. The twist was shipped on account of Messrs. *A. Gouger & Co.* and *Mr. Stewart*; and Messrs. *A. Gouger, &* forwarded the bill of lading and invoice to Messrs. *A. Gouger, Jenkins, & Co.*, to be dealt with by them as agents for sale in the ordinary way on account of *Gouger & Co.* and *Stewart*, the owners of the goods. The "*Aurora*" arrived at *Calcutta* with the twist on board. The partners in the firm of *Gouger, Jenkins, & Co.* were then absent from *Calcutta*, and the business of the firm was transacted by their manager, *Mr. Cockshott*. *Denonauth Sein* had for some time previously been, and then was, acting as

Held, that in order to invalidate a pledge so made, under the third section of the Act, 5th & 6th *Vict.*, c. 39, it is necessary that the Court, or jury, should find that the lender had notice of the agent's *mala fides*, or want of authority to pledge the goods.

To establish such notice, it is sufficient to show that the circumstances attending the transaction were such as that a reasonable man of business applying his understanding to them, would certainly know that the agent had not authority to make the pledge, even if the agent was not also acting *mala fide* towards his principals.

An appeal abated by the death of the Respondent. Administration with the Will annexed was granted to the Administrator-General of *Bengal*. On the application of the Appellant the appeal was revived against the Administrator-General, as the personal representative of the Respondent.



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*Banian* for the firm of *Gouger, Jenkins, & Co.*, and so continued to act until the month of *February*, 1858, when he absconded.

On the 18th of *February*, 1858, while so acting as *Banian* of that firm, Mr. *Cockshott* handed to *Denonauth Sein* the bill of lading of the twist, for the purpose of enabling him to get from the ship's agents the usual delivery order to get signed, and delivery of the twist made to Messrs. *Gouger, Jenkins, & Co.* On the following day *Denonauth Sein* informed *Cockshott* that he had sold the twist to one *Doorgapersaud*, the price to be paid in cash on delivery of the goods from the godowns or warehouses of Messrs. *Gouger, Jenkins, & Co.*, and the same to be cleared away and settled for within forty-one days, and *Cockshott* accordingly entered the sale in the contract book of the firm. On the 23rd of the same month the ship's agents signed the delivery order. It appeared that on the 24th of that month, *Denonauth Sein* borrowed from the Appellant, who was a money-lender at *Calcutta*, the sum of Rs. 20,000, on a pledge of the bill of lading, without the knowledge of Messrs. *Gouger, Jenkins, & Co.*, who had never authorised him to pledge or deal with the same. *Denonauth Sein* was at this time largely indebted to *Gouger, Jenkins, & Co.*, and had frequently been pressed by *Cockshott* to reduce the amount of his debt; and it appeared that he had taken the first part of the bill of lading to the Appellant, and informed him of the sale to *Doorgapersaud*, and of the entry thereof in the book of the firm, and that the price had not been paid by *Doorgapersaud*, and that the latter had forty-one days to clear the twist from the godowns of Messrs. *Gouger, Jenkins, & Co.* The Appellant retained the first part of the bill of lading,

and advanced to *Denonauth Sein*, who was in want of money, the sum of Rs. 20,000, less Rs. 400, which he deducted. and returned for interest, and he then received from *Denonauth Sein* his note of hand, and also a memorandum of deposit of the bill of lading in consideration of the advance so made. Before making the advance the Appellant enquired of *Cockshott* as to his authority to hand the bill of lading to *Denonauth Sein*, but the Appellant did not enquire of *Cockshott* whether *Denonauth Sein* had the authority of his principals, Messrs. *Gouger Jenkins, & Co.*, to pledge the bill of lading. Of the money so received, *Denonauth Sein* paid the sum of Rs 10,000, into the Oriental Bank to his principals' account. On the 2nd of *March*, 1858, the Appellant applied to *Ryan*, by letter, for delivery of the twist, but the same having been claimed by Messrs. *Gouger, Jenkins, & Co.*, who denied the Appellant's right to it, they desired *Ryan* not to give it up to him, to which he assented, on being indemnified by Messrs. *Gouger Jenkins, & Co.*, against the Appellant's claim. An action of trover was in consequence brought by the Appellant against *Ryan* in the Supreme Court at *Calcutta*, for the recovery of the value of the twist. The Defendant pleaded two pleas, first not guilty, and second not possessed. The Plaintiff joined issue on those pleas.

The action was tried before the Chief Justice, Sir *James Colville* and Sir *Charles M. R. Jackson*. Among other witnesses examined on behalf of the Plaintiff was the Plaintiff himself, *Denonauth Sein*, and *Cockshott*. The facts above set forth were proved at the trial, and evidence was given of the nature of the duties of a *Banian*. The Supreme Court found a verdict for the Plaintiff on the plea

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of not guilty, and a verdict for the Defendant on the plea of not possessed, upon which judgment was entered up for the Defendant.

The Plaintiff obtained a rule *nisi* for a new trial, on the grounds, first, that the verdict was against the evidence; and secondly, that there had been a misdirection.

After the argument upon the rule, Sir James W. Colville, on the 4th of March, 1859, delivered the judgment of the Court, as follows:—"The only pleas are not guilty, and not possessed. If the second issue is established, there can be no doubt about the conversation. Therefore, the only substantial question at the trial was, whether the Plaintiff had made out that right to the possession of the goods which entitled him to maintain the action. The goods were consigned by the ship '*Aurora*' to Messrs Gouger, Jenkins, & Co., as factors, for sale, on the joint account of Messrs. Gouger & Stewart, the former only of whom is a partner in Gouger, Jenkins, & Company. The '*Aurora*' arrived in February, 1858, about the 18th of that month, Cockshott, who then managed the business of Gouger, Jenkins, and Co., as the constituted attorney of the two partners, both of whom were absent and in Europe, delivered to Denonauth Sein, the *Banian* of the firm, the bill of lading, for the goods blank indorsed, but for the special purpose only of getting from the agents of the ship the usual delivery order, under which, in the ordinary course of business, the goods would have been landed and brought to the godowns of Gouger, Jenkins, & Co. Some delay took place in getting the delivery order, which was not written across the face of the bill of lading until the 22nd of February. The form of it, notwithstanding the blank indorse-

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ment, is, 'Deliver to *Gouger, Jenkins, & Co.*' And there was evidence that it is according to the usual course of business here, though neither the necessity nor the prudence of the custom is apparent, to send bills of lading, when delivery orders are required, with the blank indorsement of the holders. In the meantime, and on the 19th of *February*, *Demonauth Sein* represented to *Cockshott* that he had found purchasers for the seventy-five bales of twist; and thereupon the usual contract of sale with *Doorgapersaud* and others, was entered in the sale-book of Messrs. *Gouger, Jenkins, & Co.*, but by accident or design (a circumstance which seems to have occurred on other occasions) was not signed by *Doorgapersaud*, the declared purchaser. It however bears the initials of *Cockshott* in token of his approval of it. On that contract, Messrs. *Gouger, Jenkins & Co.*, appear to be the vendors of the goods, and the price is made payable on delivery from their godowns to the purchaser, who undertakes to clear away and settle for the goods within forty-one days after the date of the contract. It will now be convenient to state what, in our judgment, has been proved in the action touching the functions and powers of the *Banian* in relation to the firm of *Gouger, Jenkins, & Co.*, particularly with reference to this transaction. It is necessary to consider the evidence in this particular case, because, as we have had occasion to remark in other cases, although there may be a general similarity, there is by no means that uniformity in the relations of *Banians* with their employers in this city, which would justify us in assuming any of the points in question as known usages of trade. In the present instance there seems to have been

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no written agreement of *Banianship*; but upon the parol evidence, the Court at the trial, inclining where they differed, rather to Messrs. *Jenkins* and *Cockshott* than to *Denonauth Sein*, who was a witness open to great suspicion, came to a very clear conclusion, that the relations of *Gouger, Jenkins, & Co.*, and *Denonauth Sein*, might fairly be described as follows :—It was the duty of *Denonauth Sein*, as *Banian*, to find purchasers for goods imported by the house; when found, they were brought by him to the partners, or other European manager, like *Cockshott*, of the house, and if the bargain was approved of, a formal and written contract, like that which has been put in evidence, was entered in the sale-book; *Gouger, Jenkins, & Co.*, invariably appearing on the face of it as the sellers. This contract, in the proper and ordinary course of business, would be signed by the purchaser, though that ceremony seems, in this and in other instances, from carelessness or other cause, occasionally to have been omitted. The approval of the contract was intimated by affixing the initials of the partner or manager, in the present instance of *Cockshott*. The delivery would generally be from the godowns of Messrs. *Gouger, Jenkins, & Co.*, though, for the convenience of both, or either party, it might sometimes be made from the ship's side; and after the execution of the contract and its approval by this employers, the *Banian* would have an implied authority, without further reference to them, to make delivery, pursuant to the terms of the contract, but not otherwise, to the purchaser. The *Banian*, however, was not merely an agent or servant with these duties and powers.

Upon all sales he received a *dustoorie*, or commission, payable by the purchaser; and for this, as for a *del credere* commission, he guaranteed the acceptance of the goods and the payment of the price by the purchaser. By reason of this guarantee he became liable, when the time fixed by the contract for taking delivery had expired, or at the end of the month within which that time fell, to be charged in account with the price of the goods sold; and if he were so charged, any rights which the vendors had against the defaulting purchaser would, if exercised at all, be exercised for his benefit. He had also a general authority to receive payment according to the terms of the contract; and if he received payment before he was so chargeable in account, it would seem that he got what benefit might arise from the intermediate use of the money. Hence arose a running account between him and the house, in which he was debited with all the proceeds of goods sold with which he had become chargeable as above-mentioned, and was credited with the value of goods purchased on this credit for the house in the bazaar, and with his other disbursements, if any, on account of the house. It is proved that, at the date of the transaction in question, *Denonauth Sein* was largely indebted on the balance of this account. It is not proved that he was ever in advance to the house. Inasmuch, however, as some of the arguments which have been most strongly urged against the verdict are founded on this course of dealing, it is necessary to state positively, as one of our conclusions of fact, that the house never looked or intended to look exclusively to the liability and credit of the *Banjan*, or

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to abandon, so far as they might be necessary for its own protection, any remedies which it might have under the contract against the purchasers, or any security which the law might give them by way of lien upon the goods. We come to this conclusion, not merely because we think that the positive testimony of Messrs. *Jenkins* and *Cockshott* is more worthy of credit than the loose evidence of *Denonauth Sein* and the Plaintiff on this point, but also because the former seems to us to be consistent with and confirmed by the written contracts in the sale-book, and the whole course of dealing evidenced by them. If, then, our view of the evidence is correct, it follows that the powers and duties of *Denonauth Sein*, between him and his employers, with reference to these goods, after he received the Bill of lading, were, before the contract with *Doorgapersaud* to get the goods landed and brought to the godown of *Gouger, Jenkins, & Co.*, and after the approval of that contract, to deliver the goods on payment of the price, pursuant to the contract, but until such delivery to keep them in the godowns of *Gouger, Jenkins, & Co.*, or otherwise in their actual or constructive possession. The pledge under which the Plaintiff claims title took place after the approval of the contract, and, therefore, whilst *Denonauth's* authority was of the latter description. He seems, some short time before, to have confided to the Plaintiff that he was in want of money, and to have come to some general understanding with him concerning advances upon the pledge of goods; but it does not, I think, very clearly appear that more than a transaction of this kind actually took place between them. The Plaintiff

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and *Denonauth Sein* do not altogether agree in their evidence as to the preparation of the instrument of pledge, of the minor details of the negotiations which led to it. But it is clear that, on the 24th of February, *Denonauth Sein* handed the bill of lading to the Plaintiff, signed the instrument of pledge, and received, by cheque on the Bank of Bengal, Rs. 19,600, being the sum for which he pledged the goods, less Rs. 400 retained by way of discount. The letter of pledge is altogether silent about *Doorgapersaud* and the previous sale to him. It is, on the face of it, a pledge by the *Banian*, for his own purposes, of goods imported by his principals; but it is abundantly clear, on the evidence of the Plaintiff himself, that before he advanced his money he had been informed that *Gouger, Jenkins, & Co.* had sold these goods to *Doorgapersaud*, who had not paid the price of them, and was not entitled to the delivery of any for which he had not paid. The assent of *Doorgapersaud* to the transaction has been urged as an argument in the Plaintiff's favour: but it is obvious that the transaction has none of the essential elements of a subcontract by *Doorgapersaud*, in order to raise and pay the price of the goods. The advance is less than the whole price; the deposit is of the whole parcel of goods; the loan is to *Denonauth Sein*; he incurs a personal liability on his note of hand for it; the charges and risk of landing, and the cost of storing the goods are to fall on him. The pledge imports no liability on the part of *Doorgapersaud*. He has nothing to do with it, except that he retains the right of clearing the goods as he can pay for them, and of converting the Plaintiff's lien on the goods into one on their



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proceeds. Upon this state of facts, the Plaintiff at the trial rested his title (nor do we see how he could do otherwise) upon the last Factors Act, the 5th & 6th Vict. c. 39, extended to this country by Act No. XX. of 1844. The evidence, however, involved a question which, if decided in favour of the Defendant, would, it was urged, deprive the Plaintiff of the protection of the Factors Act, even though he were otherwise entitled to it. It was insisted that there was evidence from which the Court might conclude that the alleged contract with *Doorgapersaud* was a mere fraudulent contrivance of the *Banian*, in order to gain dominion over the goods; and, therefore, that upon the authority of *Kingsford v. Merry* (26 L. J. Exch. 83), and *Higgon's v. Burton*, (26 L. J. Exch. 342), the pledge of *Denonauth Sein* could not give a title even to a *bonâ fide* pledgee. This question we decided at the trial in favour of the Plaintiff, not because we had or have a very confident opinion that the sale to *Doorgapersaud* was a real *bonâ fide* transaction, but because we thought that it lay upon the Defendant to impeach it by calling *Doorgapersaud*, of whom both sides seemed to be afraid, and that we could not, in the absence of direct evidence, and on mere suspicion, presume that the alleged contract, which *Cockshott* and the Plaintiff had both at one time treated as valid, was a mere fraudulent pretence. The other questions considered at the trial were, first, whether *Denonauth Sein* was an agent, entrusted with the possession of the goods, or the document of title to them (the bill of lading), within the meaning of the Act; secondly, whether it did not sufficiently appear on the whole evidence, that the particular transaction was, by force of the

third section, excluded from the protection of the Act. On the first of these issues the burthen of proof lay on the Plaintiff; on the second, it lay on the Defendant. Upon the first of these questions, it appeared to us that *Dononauth Sein* was something more than a mere servant, or one of that class of agents which, in *Wood v. Rowcliffe* (6 Hare, 191), was held not to be within the scope of the last Factors Act; that he was a mercantile agent, though with powers far short of those of a general agent or factor for sale. We thought further, being such an agent, and entrusted, though for a special purpose, with the bill of lading, blank indorsed, he might, in certain circumstances, have made a pledge of the goods, which would have been protected by the Act; although it appeared, on the face of the document and otherwise, that he held it only as agent for *Gouger, Jenkins, & Co.*; whether we went too far in this it is unnecessary on this rule to inquire. But upon the other question we thought that the evidence brought the case within the proviso of the third section. We thought that the sale to *Doorgapersaud* (treating it as a real contract), and the communication of that sale to the Plaintiff before he advanced his money, put the Plaintiff into an entirely different position from that in which he might have stood had there been no such sale, or had he been ignorant of it. In the first place, it entirely negatived the existence of that state of things which generally calls for the application of the Act, namely, a general agency involving a power to sell, and, therefore, under the provisions of the Act, a power to pledge, unless the non-existence of the latter power was made known to the party taking the goods. For the Plaintiff knew that it *Dononauth Sein* ever had a power to sell these

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goods, that power had been expended by the sale ; and he knew more, he knew that the sale had been made, not by *Denonauth Sein*, but by and in the name of his principals, and that *Denonauth Sein* never had had the unqualified power of a factor for sale. He must be taken on his own evidence to have known further, that the goods had not been paid for ; that *Doorgapersaud* was not entitled to delivery or possession of them, except upon payment ; and that the agency of *Doncnauth Sein* was limited to the retention of the goods on behalf of *Gouger Jenkins, & Co.*, until payment pursuant to the contract, whatever it might be, and to delivery upon such payment being made to him as agent of the seller. Yet, with the knowledge that the interest of *Gouger Jenkins & Co.* in the goods, was simply that of unpaid vendors, and that the possession of *Denonauth Sein*, actual or constructive, was attributed to that interest, and could not extend beyond it ; he takes from *Denonauth Sein*, a pledge which might, as in fact it did, injuriously affect the position and interest of his principals, and, in the event of his insolvency, which happened, deprive them of the price of their goods, contrary to the known course of dealing between Merchants and their *Banians*. The case might be stronger if the Plaintiff were fixed with knowledge of the terms of the written contract, and, in an ordinary case, we should have held that, by what he knew, he was so put upon an inquiry into those terms as to be fixed with constructive notice of them. But, inasmuch as the Factors Act proceeds very much upon the principle of 'no questions asked, (a principle which may have been wisely introduced so far into commercial transactions, but which is certainly not found to be conducive to

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honesty and fair dealing in the general concerns of mankind), we will not push the knowledge of the Plaintiff, actual or constructive, to this extent. It seems to us, however, that upon his own admissions of what he knew, the Court at the trial, rightly came to the conclusion that the circumstances were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that *Denonauth Sein* had not authority to make the pledge, if not also that he was acting *mala fide* in respect thereof, against his principals. Some exception was taken, on the argument of the rule to this application of Lord *Tenterden's* ruling, in *Evans v. Trueman* (1 Mood & Rob. 10), which, it was said, was a case that arose under the earlier Statute, the 6th Geo. IV. c. 94. But it is to be observed that the ruling, modified as we have modified it, is adopted by Lord *St. Leonards* in his celebrated judgment in *Navulshaw v. Brownrigg* (2 De G. Mac. & Gor. 452), as a proper mode of leaving to the jury the question of notice, under the 5th & 6th Vict. c. 39. It remains to consider a few of the objections, which on the rule have been urged to the finding of the Court, and have not already been incidentally noticed. It has been urged strongly that, inasmuch as Rs. 19,600, were actually advanced and paid, there would not be *mala fides*. But an actual advance cannot be conclusive of the question of *bona fides*; since, if so, there would be no necessity expressly to require *bona fides* on the part of the pledgee, by the third section of an Act which professes only to protect transactions in which money has been actually advanced. Again, *bona fides* in the pledgee is not alone sufficient. It is necessary that there should also be (see *Navulshaw*

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v. *Brownrigg*, p. 450) "no notice that the agent is making the contract, either *mala fide* or beyond his authority." Again, it is said, there was no evidence of a lien on the goods. If this is meant of the existence of a vendor's lien under the contract, it is contradicted by the contract itself. But it is argued that the lien was waived by allowing *Denonauth Sein* to deliver without further consent from his principals. His authority, however, was only to deliver upon payment of the price. The lien would not the less subsist, even if he had been entrusted with the possession of the goods, since he can only have been entrusted with them in order to work out that lien for his principals, to whom it belonged. Had the goods been brought into their *godowns*, as, in the ordinary course of business they ought to have been, he would not have had the possession of them; he would have had merely the power of taking them out of those *godowns*, and delivering them as paid for. Then, it is said, the Plaintiff had no notice of any such lien. But surely this is a fallacy. He knew that *Denonauth Sein* held the goods only as agent for *Gouger, Jenkins, & Co.*, and that they had been sold to *Doorgapersaud*, who was not entitled to receive them until he had paid for them. This pledge, if a pledge of anything, was of the vendor's interest in the goods, that is, of the lien, until payment and delivery to *Doorgapersaud*, and of the proceeds afterwards. Again, it is argued that the lien was waived either by reason of the course of dealing between the house and the *Banian*, or by reason of the admission of *Cockshott*, touching the application of Rs. 10,000, part of the sum advanced by the Plaintiff. Now, one does not see how the lien could be waived except in

favour of the purchaser, and it is clear that, at the time of the pledge, *Doorgapersaud* neither was, nor represented himself to be, entitled to the possession of the goods. If it be meant that the lien was transferred to *Denonauth Sein*, the answer is that it was transferred to him only as agent, and for the benefit of his employers. The right to charge the *Banian* in account, under his guarantee, does not seem to us to affect this question, for that right could not accrue until the expiration of the forty days fixed for taking delivery, at which time either the contract must have been performed by delivery on the one hand and payment through the *Banian* and agent on the other, or the purchaser must have failed in the performance of the contract. And, in the particular case, the right was never exercised. Again, nothing in our judgment turns upon the expression of *Cockshott*, of which much more has been made on the rule than was made at the trial, in his examination *de bene esse*, to the effect that when the account put in was acknowledged, he knew that Rs. 10,000 of the money had been applied in purchase of the Bills of the Oriental Bank. The time when the account was acknowledged is not stated, but it was obviously later than that at which the account was made out; still later than that at which the bill became due. The case as to the Rs. 10,000, is simply this :—*Denonauth Sein*, when bound to lay out that sum for his principals out of other moneys due from him, obtains that and more by means of an unauthorized and fraudulent pledge of these goods. The result to his principals is the same. If the pledge avails against them, they, to the extent of it, have been defrauded of the price of their goods, whether any part of the

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money went to reduce the balance due from the *Banian* on other transactions, or not. Lastly, on this question of lien, the Plaintiff's Counsel invoked the doctrine of *Beardman v Sill* (1 Camp, 416 n.), and argued that the Defendant, not having set up a claim of lien originally, but having contended that the sale was a fiction, could not afterwards insist upon it. But there is no room here for the application of that doctrine. The Defendant does not now rest the defence as upon a subsisting lien. The lien was a circumstance which, if the contract was real, existed at the time of the pledge. When *Doorgapersaud* repudiated, or failed to complete his contract, the Defendant's property in the goods reverted. He is precluded from resisting the Plaintiff's title under the Factors Act, by insisting on any circumstance found by the Court to have existed at the time of the pledge. We have already incidentally dealt with the arguments which treats the transaction as a pledge by or with the concurrence of the purchaser in order to raise the price of the goods. Upon the whole, then; no ground has been laid before us which induces us to disturb the verdict for the Defendant; and I need not say that it is a great satisfaction to Mr. Justice Jackson and myself, who alone tried the cause at *Nisi Prius*, that the rule has been argued before a full Court, and that we are supported in our view of the case by Mr. Justice Wells, whose only doubt is, whether upon the evidence, *Denonauth Sein* was an agent entrusted with the bill of lading within the meaning of the Act. That question, however, we have treated as not open on this rule."

The appeal was from this judgment."

After the admittance of the appeal, *Ryan* died,

whereby the appeal became abated. Letters of administration with the Will annexed of *Ryan* were granted by the Ecclesiastical side of the Supreme Court at *Calcutta* to the Respondent, the Administrator-General of *Bengal*.

The Appellant now moved to revive the appeal against the Administrator-General, as the legal, as personal representative of *Ryan*.

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Mr. *W. Field*, appeared in support of the application.

By an Order in Council it was directed that the appeal be revived against the Administrator-General of *Bengal* for the time being, and that the appeal be put in the same plight and condition as it was before the death of *Ryan*.

The appeal, being thus revived, came on for hearing.

Mr. *Bovill*, Q. C., and Mr. *W. Field*, for the Appellant.

Our contention is, that *Denonauth Sein* had authority from, *Gouger, Jenkins, & Co.* to pledge the bill of lading and goods. He was the *Banian*, or agent of the firm, exercising powers similar to a factor in this country, and entrusted by his firm with the bill of lading in blank, and his act comes within the meaning of the first section of the Factors Act, 5th & 6th *Vict.* c. 39, which Statute was extended to India by the Act of the Indian Legislature, No. XX. of 1844,

\* Present: Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

*Assessor*,—The Right Hon. Sir Lawrence Peel.



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and the pledge was valid within that section, and did not fall within the third section of the Statute. The evidence does not establish *mala fides* on the part of *Denonauth Sein*, the transfer of the bill of lading is not disputed, neither is any objection taken that full value was not given, nor that the Appellant had notice of any want of authority, or *mala fides* on his part, which is necessary to bring the case within the third section. How, then, can it be treated as a fraud? The true rule is to be found in *Evans v. Trueman* (a). That case arose under the Statute, 4th Geo. IV. c. 83, and Lord *Tenterden*, referring to the Statute 6th Geo. IV. c. 94, says, "The expression in the Statute is, that a party is to be entitled to its protection if he shall not have notice by the documents, or otherwise, that the pledger was not the actual and *bona fide* owner of the goods pledged: a person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so: knowledge acquired in either of these ways is enough, I think, to exclude a party from the benefit of the provisions of this Statute; slight suspicion, I think, will not." The principles are recognized by Lord *St. Leonards* in *Navulshaw v. Brownrigg* (b), which case turned upon the Statute, 5th & 6th Vict., c. 39, the Statute in question; there his Lordship, referring to *Evans v. Trueman*, observes, "It is necessary, therefore, even according to this case, to fix a man with knowledge of the want of authority, in order to take from him the benefit of the Statute." The same rule prevails with respect to

(a). 1 Mood. & Rob., 10. (b) 2 De G. Mac. & Gor' 452,

Bills of Exchange, *Backhouse v. Harrison* (a), *Goodman v. Harvey*. (b) *The Bank of Bengal v. Radakisser Mitter* (c), *Wilkins v. Jadis* (d). Gross negligence may, it is true, be evidence of *mala fides*. *Raphael v. The Bank of England* (e) — [The Lord Justice KNIGHT BRUCE: Is there here anything but a question of fact? You accept the case of *Navulshaw v. Brownrigg* as law, and that case the Judges in the Court below relied upon in their judgment against you.] *Denonauth Sein* was a *Banian* and acted for other persons, as well as the firm of *Gouger & Co.*, and was subject to a monthly account with his principals, therefore, independently of the Act, he had power to pledge the bill of lading, as it was within the general scope of his authority, *Prescott v. Flinn* (f), *Story* on Agency, sec. 26. It may be urged that the evidence of usage as respects this last position is not strong, but one or two instances of usage is enough, *Holt's Nisi Prius* Rep., p. 270. Moreover, it must be taken that the pledge of the bill of lading by *Denonauth Sein* with the Appellant was ratified by *Gouger, Jenkins, & Co.* That firm accepted the Rs. 10,000, part of the Rs. 19,600 received by *Denonauth Sein* with knowledge of the manner in which the money was procured.

The Solicitor-General (Sir R. Palmer), Mr.

Leith, and Mr Honyman, for the Respondent.

The Court below upon the evidence rightly held that the case came within the third section of the Factors Act for India, No. XX. of 1844, which prevents the

(a) 5 Barn. & Adol., 1098.

(c) 3 Moore's Ind. App. Cases, 19.

(e) 17 C. Ben. Rep 161.

(b) 4 Adol. & Ell., 870,

(d) 2 Barn. & Adol. 188.

(f) 9 Bingh., 19.

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Appellant acquiring any title to the goods sued for. *Denonauth Sein* was not an agent entrusted with the bill of lading within the true meaning of that Act. The evidence establishes the fact, that he never was authorized by Messrs. *Gouger, Jenkins, & Co.*, to pledge the bill of lading in question. The whole question depends upon evidence which has been sifted and rightly applied by the Court below. It cannot be urged with any success, that because *Denonauth Sein* was indebted to his principals and paid in the sum of Rs. 10,000, to their account, that it amounted to a ratification of his act of pledging, which we submit was *mala fides*.

Their Lordships' judgment was reserved, and now pronounced by

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The Lord Justice KNIGHT BRUCE:

This was an action of trover, brought in the Supreme Court at *Calcutta*, to recover the value of certain bales of twist. The pleas were, not guilty and not possessed. The original Defendant was one *Ryan*, Master of the ship "*Aurora*"—he is now deceased—and represented by the nominal Defendant; but as the action was defended on the indemnity of Messrs. *Gouger, Jenkins, & Co.*, Merchants at *Calcutta*, it will be convenient to treat them as the Respondents. The case was tried, before the then Chief Justice, Sir *James W. Colville*, and Sir *Charles M. Jackson*; they found a verdict for the Defendants, and subsequently discharged a rule for a new trial which had been applied for on the grounds of misdirection, and of the verdict being against the evidence. Judgment was entered up, and against this verdict and judgment the present appeal has been brought.

The undisputed facts of the case are substantially as follows:—The goods in question were shipped in London by *Alfred Gouger* on behalf of himself and a Mr. *Stewart*, and consigned to Messrs. *Gouger, Jenkins, & Co.*; the bill of lading was forwarded to them. At the time of the arrival neither *Gouger* nor *Jenkins* was at *Calcutta*, and the business of their firm was being carried on by *James Tobin Cockshott*, under a power of attorney. The firm had been in the habit of employing a *Banian* of the name of *Denonauth Sein*; to this man *Cockshott* gave the bill of lading indorsed in blank, for the purpose of procuring a delivery order, and the delivery of the goods to the firm; but it was also part of the ordinary employment of *Denonauth Sein*, which applied to the present transaction, to procure a purchaser, and when he had so done, he was to report the name of the buyer and the terms to his principals for their assent to the contract. If they agreed, their initials were written upon it, which being done the *Banian* had authority to deliver the goods to the purchaser and receive the price. Between the *Banian* and his principals there was an account current, which was balanced at the end of the month; he was then debited for the contract price of the goods sold, and credited for the sums which he paid to the house; he received his "*dustoree*," or commission, from the purchaser.

In the present case he contracted for the sale of the goods to one *Doorgapersaud*, and by the terms of the contract the goods were to be cleared away and settled for within forty-one days after landing days, from the date of the contract, the 19th of *February*, 1848. To this contract *Cockshott* assented, and affixed his initials, and thenceforward *Denonauth*

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*Sein* became entrusted, as between himself and his employers, with the bill of lading for the purpose of delivering the goods on the terms of the contract; they were by these terms made deliverable on payment in cash.

In this state of things, *Denonauth Sein* and *Doorgapersaud* went to the Appellant, a Banker and money-lender. According to the evidence, they represented to him that the latter had made a contract for the twist, and *Denonauth Sein* produced the bill of lading; it was stated that *Doorgapersaud* could not pay the whole amount, between Rs. 23,000 and Rs. 24,000, in one sum, that they (the two) wanted an advance. It was finally arranged that the Appellant should advance to *Denonauth Sein*, Rs. 20,000 less Rs. 400, deducted for discount. *Denonauth Sein* gave him his own promissory note for the amount, and signed a letter prepared by him, which stated the fact of the delivery to him of the bill of lading, and gave him authority to sell for his own benefit the goods in case of non-payment within one month and a half, refunding any excess that might remain after deducting the principal and interest, and other charges, and making *Denonauth Sein* liable to him for any deficiency on the sale. Upon the authority of this instrument the delivery of the goods was demanded by the Appellant, and refused upon the indemnity of the Respondents; and the present action brought.

It is stated that Rs. 23,600 were paid to *Denonauth Sein*, and of these he paid Rs. 10,000 to the Oriental Bank on account of the Respondents, in obedience to a previous order, and had credit from them for the amount in the account current between them, in

which he was at the time, and still remains, largely indebted to them in respect of previous sales and other transactions on their behalf.

Upon the trial some evidence was given as to the nature of *Denonauth Sein's* employment, and the character and extent of his agency. The Court found that he received the bill of lading for the especial purpose of getting delivery of the goods, and that before the delivery order given, but after the receipt of the bill of lading, he informed his employers of the sale, and that they approved of the purchaser; that he was not strictly a Factor, but more than a mere servant—an agent to find purchasers, and, under some circumstances, to guarantee the payment; that the bill of lading was allowed by *Cockshott* to remain in his hands to obtain delivery of the goods, and that he had full authority to give delivery to purchasers on payment of the price; that he was, in the transaction in question, an agent within the meaning of the last Factors Act; that it must be taken on the evidence that the contract of sale with *Doorgapersaud* was not fraudulent; and that the only question remaining was, whether the pledge to the Appellant was protected by that Act—as to which the Court thought that the facts raised the inference that there was *mala fides* on the part of *Denonauth Sein* in dealing as he had done with the goods; and that the Appellant had notice that the pledge was without authority from the Respondents, and not *bona fide*. They, therefore, held that the transaction did not come within the protection of the Factors Act, and that the verdict must be for the Respondents.

On this finding the rule was obtained which we have stated above, and, after argument, discharged,

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upon the grounds stated in a very able and learned judgment delivered by Sir *James W. Colvile*, the correctness of which their Lordships are now to consider. In doing so it may be convenient, in the first place, to dispose of the question of a misdirection; and this they will do very shortly; for it seems to them that there is not the slightest ground for this part of the rule.

The question which the learned Judges made the cardinal one in the case, was, whether the circumstances were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that *Denonauth Sein* had not authority to make the pledge, if not, also, that he was acting *mala fide* in respect thereof against this principals.

This is precisely the way in which the question was put to the jury in a case under the first Factors Act, 6th Geo. IV., c. 94, *Evans v. Trueman* (1 Moo. & R. 10.); and this was unquestioned at the time, though the case came before the Court on another point; this mode of leaving to the jury the question of notice was approved of by Lord *St. Leonards*, in *Navulshaw v. Brownrigg* (2 De G. Mac. & Gor., 452), as a proper mode under the last Factors Act, 5th & 6th Vict., c. 39; on which, in substance, the present case depends. And their Lordships entirely concur in the principle established by these authorities. The question so put gives full effect, on the one hand, to the large words of the first section of the Act, and effectuates the object of protecting pledges and exchanges of securities made *bona fide* by agents entrusted with them, in consideration of advances made in respect thereof; and,

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on the other hand, it gives proper, and no more than proper effect to the third section, which limits such protection to loans, advances, and exchanges made *bona fide*, and without notice, either that the agent making them has not authority to make the same, or is acting *mala fide* in respect thereof against the owner of the goods represented by the document pledged. It makes the decision depend not at all on mere suspicion, on the want of inquiry or of reasonable caution in the party advancing on the pledge, nor yet on the mere want of good faith in the agent, of which the party advancing is ignorant: all these, and such matters as these, which are in themselves inconclusive, and tend to embarrass the dealing with negotiable instruments, may be evidence; but the Tribunal deciding the issue, whether the jury, or, as there, the Judges acting as a jury, must, in order to bring the case within the third, and take it out of the first section, categorically find the facts of want of good faith, and of notice to the lender of want of authority in the agent, or that he is acting *mala fide* in the transaction against his principal. The Statute is silent as to the grounds on which the conclusion is to be arrived at; that is left to the ordinary principles of evidence. But, where the fact is so found, it would be as much against mere honesty as against the interests of commerce, properly considered, to afford any protection to the transaction. This objection, therefore, to the judgment entirely fails.

It remains to consider whether the verdict was against the evidence, and in doing so it will be necessary to introduce some additional facts, which did not find their place in the previous summary.



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Upon a careful consideration of all the circumstances, and after attention given to the arguments of the Appellant's Counsel, their Lordships are of opinion, that the Judges below have drawn the only right conclusion, that to which their Lordships would have been themselves led, and that the Court has shown great caution in not pressing its inferences as far, perhaps, against the Appellant as in strict justice might have been warranted.

The Judges say, that where there was a conflict of testimony between the Appellant and *Denonauth Sein* on the one hand, and *Fenkins* and *Cockshott* on the other, they had been disposed to credit the latter rather than the former. Now, it being assumed that *Denonauth Sein* was an agent entrusted with the document of title of the goods, so as to bring the case within the first section of the Statute, the advance which the Appellant made will still not be protected unless made *bona fide*, and without notice that the agent making the contract had not authority to make the same, or was acting *mala fide* against the owner. The Appellant must in the first place have acted *bona fide* in making the advance; and, secondly, he must have been without notice of want of authority in the agent; or, thirdly, of the *mala fides* in him against the owner. It appears to their Lordships that the evidence established all these three propositions.

As to the first, they assume that the Appellant really advanced the large sum of Rs. 19,600, but this alone will not establish his *bona fides*; he did so on advantageous terms to himself (whose business it was to lend money), in respect of the rate of discount and interest, and of perfect security, if the transaction should remain unimpeached. But beyond

this it was essential to his *bona fides* that he should believe the representations of *Denonauth Sein* and *Dörgapersaud*; and if he believed these, he must have believed, also that the goods were actually sold to the latter, and were to be cleared and settled for in forty-one days: yet the terms of his advance were that he might, when he pleased, remove the goods at the cost of *Denonauth Sein* to his own godowns, and at the end of a month and fifteen days sell them, if the advance were not then repaid with all charges. Now, he says, he did not come to this agreement without cautiously inquiring as to the power under which *Cockshott*, the apparent principal for the time being of *Denonauth Sein*, was said to be acting, and that he went to *Cockshott* for the purpose of seeing it, and did so. If he had been acting *bona fide* towards *Cockshott*, it seems to us that, exercising this somewhat superabundant caution as to the power, it is incredible that when in *Cockshott's* presence he should have made no inquiry or communication respecting this particular transaction; yet their Lordships think it perfectly clear upon the evidence that he did not. When it is considered how conclusive that communication, one way or the other, would have been, they cannot doubt that it would have been made by any one about to enter into such a transaction *bona fide*, nor that it would have been stated, if it had been made; but neither does the Appellant affirm it in his evidence nor was *Cockshott* cross-examined to it; and he, having been examined on interrogatories before the trial, and not being at the trial, his silence on the subject is entirely consistent with the same conclusion. If the transaction had been *bona fide* on the part of the Appellant, the communication, as we have said,

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would naturally have been made, but if it were *mala fide*, it certainly would not; because it must have been known that it would put an end to the transaction at once, and that *Denonauth Sein* would not have been allowed to pledge goods which were already under contract of sale. This circumstance however, strong as it is, does not stand alone. *Denonauth Sein* comes to the Appellant, not armed with all the documents which are stated to be usually in the hands of an agent authorised to pledge, and without excuse for their absence; and he comes, too, as an agent who has already confessedly exhausted his authority in respect of the goods, by the contract which he has made for the sale of them, and who seeks to pledge them on terms inconsistent with the terms of that contract. The presence and implied assent of the purchaser, so far from lessening these difficulties, was of a nature only to increase the suspicions attaching to the transaction.

The evidence enables their Lordships to deal with the two remaining questions at the same time. Had the Appellant notice that *Denonauth Sein* was without authority to make the contract of pledge, or that he was acting *mala fide* against his principals? They think that the evidence warrants an answer in the affirmative as to both. First, it is clear that in fact he had no authority express as to this transaction, or to be implied from any previous course of dealing; and if in truth he had been allowed to pledge more frequently, or with greater similarity of circumstances to those of the transaction in question than the evidence here discloses, there is nothing to show that the Appellant was aware of this, or acted on the credit of it. Secondly, it is clear that in fact

*Denonauth Sein* was acting *mala fide* towards his principals; the account current shows that he was largely indebted to them on the balance of prior transactions; he was bound, in order to maintain his post and credit with them, to make a payment for them at that time; and he sought to do this fraudulently by raising money on their own goods, which he would have to account for at a later period, and so forestalling the proceeds of them.

But of course these facts, though necessary as a basis, are not in themselves sufficient, without notice of them to the Appellant. Whether he had such notice must be judged as any other question of fact. To adopt the question on which the Judges made their decision turn, were the circumstances such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that *Denonauth Sein* had not authority to make the pledge, or that he was acting *mala fide* in respect thereof against his principals? In answering this it must be remembered again that the Statute, though it insists on a conclusion, prescribes nothing as to the nature of the evidence on which it is to be founded, or the manner in which the inquiry is to be conducted. The question must be dealt with as any other question of fact, by a due consideration of all the circumstances. Then it may be taken here as if *Denonauth Sein* had said, "I am the *Banian* of the Respondents; I hold in my hand the bill of lading the goods consigned to them, but not delivered. I have contracted to sell them to *Doorgapersaud*, who stands now beside me. My principals have sanctioned the sale, and he is to pay for them and clear them away in forty-one days. Now, I desire you to

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advance me money on these goods; I will give you my own promissory note for the amount, and I will deposit the bill of lading indorsed with you; you may take the goods at my expense at once to your own godowns, and if I do not repay you at a period exceeding the date at which he is to clear and pay for them, you may sell them and pay yourself with interest, and all charges; and meantime you may deduct a large discount from the sum advanced;" and this offer is accepted, after a visit to *Cockshott* to see his power of attorney, and not a word said upon it to him at the interview.

The Appellant was a man of business; he had been himself a *Banian*; he either knew much of *Denonauth Sein* and his dealings, or little—if much, it is clear upon the evidence, and very material, that he had never known him, as agent of the Respondents, deal with their goods in a similar way under similar circumstances—if little, the more caution was necessary. He did apply his mind to the matter, for he required personal satisfaction as to *Cockshott's* power. What then must reasonable men, in turn applying their minds to these same circumstances, believe to have been the clear conviction in the Appellant's mind, as to *Denonauth Sein's* authority or honesty? Their Lordships think that there is but one answer to this, that he must have felt perfectly certain that *Denonauth Sien* was acting without authority; if so, it is unnecessary to say whether with *mala fides*, though upon this they do not themselves entertain any doubt.

It remains only to notice a circumstance not very strongly relied on by the Appellant's Counsel, nor, perhaps, strictly relevant to the issues in the cause,

but yet which it will be better to dispose of. It appears that in the account current between the Respondents and *Denonauth Sein* for *February*, the month in which this transaction took place, the latter is credited with the sum of Rs. 10,000, paid to the Oriental Bank for the former. These Rs. 10,000 have been taken, in the argument, and are so now, to have been a portion of the Rs. 19,600, advanced by the Appellant. It was urged that the accepting the Rs. 10,000, with a knowledge how they were procured (a fact which stands not quite clear upon the evidence), was a ratification of the dealing between the Appellant and *Denonauth Sein*. Their Lordships do not assent to this argument. The sale of the goods to *Doorgapersaud* not being to be completed until the month of *March*, would not come into the account between the Respondents and *Denonauth Sein* until the end of that month; and in the account then to be made up if it had been regularly completed, he would have been debited with the price for which they had been sold and credited with the payment of that price to them. Meantime he being largely in their debt, and having been ordered to make a payment for them in respect of some prior dealings for them, had raised the money by this fraudulent pledge of their goods. Though he had so done, yet he was the principal debtor for this money to the Appellant on his own promissory note, and if everything had gone to its regular end, the Respondents would have received nothing more from him than they were entitled to. They have now received much less. As the payment was actually made to the Oriental Bank before it appeared in the account, and in pursuance of a previous order, the Respondents could neither refuse to give *Denonauth*

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*Sein* credit for it, nor could they be called 'on to repay the money to the Appellant; any more than if, without the collateral security of the pledge, it had been advanced on the personal security only of *Denonauth Sein*. Their conduct, therefore, does not amount to a ratification of the pledge.

On all grounds, therefore, their Lordships will humbly advise Her Majesty that the judgment below should be affirmed, and the appeal dismissed with costs.

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v.

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4th 5th, &  
 16th July,  
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On an application for leave to appeal from the sentence of the *Sudder Nizamut Adawlut* (the chief native criminal Court of appeal in *Bengal*), the Judicial Committee, though of opinion that justice had not been done

**THIS** was a special petition for leave to appeal against the judgment of the *Sudder Nizamut Adawlut*, (the native criminal Court of appeal in *Bengal*), affirming a conviction of the Petitioner, *Joykissen Mookerjee*, by the Sessions Court of the *Zillah Hooghly*, on the charge of knowingly and fraudulently uttering

\* Present: Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir John Taylor Coleridge.

*Assessors*.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

in the Court below, declined to determine the question of the prerogative of the Crown to admit an appeal in a criminal matter, and to advise such admission, on the ground that such course might be detrimental to the general administration of criminal justice in Her Majesty's Colonial and foreign possessions; but suggested an application by the Petitioner to the executive authorities for relief, with an intimation of their Lordships' opinion of the hardship and injustice of the particular case,

a forged and fabricated deed, and the sentence pronounced upon him of imprisonment for five years, with hard labour, the latter commutable for a fine of Rs. 10,000.

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The Petitioner, a prisoner in the jail at *Alipore*, in the Province of *Bengal*, was a Hindoo inhabitant of *Bengal*, and was committed with one *Pitumber Bose* on the 23rd of *February*, 1861, by Mr. *J. Grant*, a Magistrate of *Serampore*, for trial before the Sessions Court of the *Zillah of Hooghly*, upon the two following counts or charges. First, for fraudulently and injuriously fabricating a written deed, an *Isarah Pottah*, dated 18th *Assar*, 1267, B. S. for one-third of *Moklar*, for ten years, at a yearly rent of Rs. 902, purporting to have been executed by *Meglall Dhur* and *Doololl Dhur* for selves and co-shareholders of *Pitumber Bose*; and secondly, for knowingly and fraudulently uttering the above fabricated deed, by presenting it for registration at the Registrar's office, at *Serampore*, on the 2nd July, 1860.

The Sessions Court of *Hooghly*, before which the Petitioner and *Pitumber Bose* were committed for trial, was established by *Ben. Reg. IX. of 1793*, entitled, "A Regulation for re-enacting, with alterations and modifications, the Regulations passed by the Governor-General in Council on the 3rd *December*, 1790, and subsequent dates, for the apprehension and trial of persons charged with crimes or misdemeanors."

The trial of the Petitioner and *Pitumber Bose* upon the above charges, took place on the 30th of *March*, 1861, and subsequent days, before *J. Lillie Esq.*



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the Additional Sessions Judge of *Hooghly*, and *Moulvee Fysoollah*, the then Mahomedan law officer of the Sessions Court of the *Zillah Hooghly*.

It appeared from the statements in the petition, that at the trial, the case for the prosecution upon the above charges having been opened, witnesses examined, and the whole evidence for the prosecution taken, when the Counsel for the prosecution applied to the presiding Judge to be allowed to amend the Record, technically called "the calendar," by adding to it a count charging the Petitioner with having caused, or procured, the forgery of the *Pottah* in question, that the Judge thereupon sent the calendar to the committing Magistrate with an order directing him to amend the same by adding such a count, and to recommit the Petitioner for trial upon such additional charge. That the Magistrate, in compliance with such order, amended the calendar by adding the following count, or charge, namely, "for causing or procuring the forgery of the *Pottah*" above described, and returned the calendar so amended to the Court of the Sessions Judge. That during the interval between the time of the calendar being sent to the Magistrate for amendment, and of its being returned to the Court of the Sessions Judge, the Petitioner remained in the Court of the Sessions Judge, the Petitioner never having been taken before the Magistrate on such additional charge; that neither prosecutor nor any of his witnesses attended before the Magistrate to prefer such charge; nor was the Petitioner himself examined before the Magistrate on such charge or called upon to answer the same; nor was any opportunity given to him to produce

evidence before the Magistrate to rebut that charge ; and that the Petitioner was not in fact committed for trial, or held to bail upon such charge, or in any manner charged or indicted thereon, save only by the addition thereof to the calendar during his absence, as before stated. That after the calendar with the additional count had been so returned to the Court of the Sessions Judge, the Petitioner was called upon to plead, and pleaded "not guilty" to all the counts of the amended calendar. And, that after the Petitioner had so pleaded no further witnesses were examined for the prosecution, but the Petitioner and *Pitumber Bose* were allowed to proceed to examine their witnesses and to put in their written defence to which the Counsel for the prosecution replied ; and that on the 4th of May, 1861, the Mahomedan law officer delivered his *Futwa*, whereby he stated his opinion that the first and second counts of the calendar had been established against the prisoner, *Pitumber Bose*, but not against the Petitioner, and that the third, or additional count, had been established against the Petitioner, whereupon, on the 6th of May 1861, the Sessions Judge convicted the prisoner, *Pitumber Bose*, on the first and second counts of the amended calendar, but disapproving of the finding of the Mahomedan law officer on the third or additional count, proceeded, in accordance with the provisions of section 53 of Reg. IX. of 1793 of the *Bengal Code*, to complete the trial, and transmitted to the *Nizamut Adawlut* a copy of all the proceedings, and the *Futwa* of the law officer, with a separate letter stating the grounds of his disapproval, and awaited the sentence of the *Nizamut Adawlut* : and that at the same time the prisoner, *Pitumber Bose*, appealed to

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the *Nizamut Adawlut* from the sentence passed upon him by the Sessions Judge. That upon the case so transmitted coming on for trial before the *Nizamut Adawlut*, the Petitioner's Counsel took objection to the proceedings of the Sessions Judge in sending back the calendar to the Magistrate with orders to add another charge against the Petitioner and proceeding to try the charge upon the same Record with those originally preferred against the Petitioner and *Pitamber Bose*, and contended that as the trial had been held and completed on the third or additional charge without any evidence having been called for by the prosecutor upon that charge the Petitioner was entitled to be acquitted thereon, but the *Nizamut Adawlut* disallowed the objection, and on the 9th of July, 1861, passed the following order:—"We remit the Record to the Sessions Judge, with directions that he will retake the evidence of the witnesses as to the third count in proper legal form, and having conducted the whole trial on that count with the assistance of the law officer who sat with him, if he be still there, and if not with his successor, pass on the prisoner, No. 1, *Joykissen Mookerjee*, whatever sentence may eventually seem just and proper. As, however, the charge against the prisoner, No. 1, cannot be substantiated unless the sentence passed by the Sessions Judge against prisoner, No. 2, who has appealed, be confirmed, the Court proposes to hear and determine that appeal before the order relating to prisoner, No. 1, be allowed to issue." That the Petitioner applied to the *Sudder Nizamut Adawlut* to review this order, but that Court rejected such application, and resolved that the order of the 9th of July, 1861, should issue in due course; and the *Sudder Nizamut Adawlut*,

after hearing the appeal of *Pitumber Bose*, convicted him of the crime of uttering a forged *Pottah*, knowing it to be forged, and sentenced him to be imprisoned with hard labour and irons for five years.

The \*Petitioner being thus compelled to undergo his trial upon the charge of having caused or procured the forgery of the *Pottah*, resolved to avail himself of the privilege conferred by Reg. VI. of 1832, of the *Bengal Code* upon all persons professing the Mahomedan faith; which by the 5th section declares, "that any person not professing the Mahomedan faith, when brought to trial on a commitment for an offence cognizable under the general Regulations, may claim to be exempted from trial under the provisions of the Mahomedan Criminal Code; and in such case the Commissioner of Circuit or Judge of Sessions presiding on the trial shall comply with such requisition, and shall proceed in one of the three modes referred to in section 4 of this Regulation, at the same time dispensing with the *Futwa* of the Mahomedan law officer;" and the Petitioner accordingly, on the 13th of *November*, 1861, filed his petition in the Court of the Sessions Judge of *Hooghly*, claiming to be exempted from trial under the provisions of the Mahomedan Criminal Code, on his then approaching trial upon the charge of having caused or procured the forgery of a *Pottah*, the same being an offence cognizable under cl. 3, sec. 4, Reg. II. of 1807, of the *Bengal Code*. The \*Petitioner then set forth the particulars of an unsuccessful application made by him to the *Sudder Nizamut Adawlut* to modify their order of the 9th of *July*, 1861, and to leave it open to the Sessions Judge to use his own discretion as to the mode of proceeding to be adopted at the trial of

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the Petitioner; and further stated that, *Moulvee Fyezsoollah*, the Mahomedan law officer belonging to the *Nizamut* Court, and who had assisted at the previous trial of the Petitioner, had been removed and was no longer attached to that Court; and that thereupon the Sessions Judge had obtained an order from the Government, requiring that Mahomedan law officer to repair again to *Hooghly*, for the purpose of sitting with the Sessions Judge, at the re-trial of the Petitioner, and had moreover received a letter from the Registrar of the *Nizamut Adawlut*, informing him that the Petitioner's claim to exemption was too late, that it should have been made before the prisoner was arraigned on the charge for which he was under trial, and directing that the Court's instructions (passed in accordance with their resolution of the 9th *July*, 1861), "should be obeyed to the letter." That accordingly, on the 11th of *December*, 1861, the Petitioner was brought to trial before the Sessions Judge of *Hooghly* and the same law officer, *Moulvee Fyezsoollah*; but before any step was taken in the trial, the Petitioner filed a further petition renewing his claim under Reg. VI. of 1832 to be exempt from trial, under the provisions of the Mahomedan Criminal Code, on the charge of causing or procuring the forgery of the *Pottah*, and praying that his trial might be proceeded with in one of the three modes referred to in sec. 4 of the Regulation, upon which the Sessions Judge recorded the following order:—"The prayer of the petition, being contrary to the express instructions of the *Nizamut Adawlut*, conveyed to me in the letter of their Register, dated the 24th of *October* last, is rejected." That the trial of the Petitioner upon the

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charge of having caused or procured the forgery of the *Pottah*, thereupon proceeded before the Sessions Judge of *Hooghly* and *Fyezoollah*, the former law officer of the Court, under protest from the Petitioner, that the Court so constituted had no jurisdiction to try the Petitioner, but witnesses having been examined, both for the prosecution and defence, *Fyezoollah* delivered his *Futwa* on the 23rd of *December*, 1861, finding the Petitioner guilty of the charge preferred against him; but that the Sessions Judge of *Hooghly*, being of opinion that the Petitioner was not guilty of the offence with which he was charged, transmitted the proceedings to the *Sudder Nizamut Adawlut*, according to sect. 53, of Reg. IX. of 1793 of the *Bengal Code*, together with a letter, stating his reasons for disapproving of the finding of *Fyezoollah*. The case thus referred by the Sessions Judge came on for hearing before the *Sudder Nizamut Adawlut*, on the 7th of *February*, 1862, when the Petitioner's Counsel, before proceeding to argue the case upon the merits, raised several preliminary objections, and, amongst others, the following:—first, that the Sessions Judge exceeded his powers in ordering the committing Magistrate to alter the calendar, or to commit or recommit the Petitioner on a new and substantive charge. Second, that the Judge, when he ordered the recommitment of the Petitioner, did not properly follow the course of proceedings, directed by the Circular Order of the *Sudder Court*, No. 70, dated the 14th of *November*, 1851, under which he professed to be acting, the effect of which was to embarrass the Petitioner in his defence, inasmuch, as two distinct trials were proceeding at one and the same time,

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the first on the two original counts, and the second on the third or additional count, embracing a new and substantive charge, and that the Petitioner was deprived of the opportunity of claiming his right to exemption from trial, under the Mahomedan Criminal Code, on the third or additional count. Third, that the Petitioner was never properly charged before the Magistrate on the third or additional count, nor examined nor confronted with witnesses in the Magistrate's Court upon that charge, and that no such charge was ever, in fact, made against the Petitioner before the Magistrate, nor any witness examined, or evidence given, before the Magistrate in support of that charge. Fourth, that the Petitioner was never in fact committed, or held to bail in due form of law, to take his trial on the third or additional count or charge, and that, consequently, the Sessions Court was without jurisdiction to try the Petitioner upon the charge contained in that count. Fifth, that the Petitioner, being a Hindoo, was entitled to claim, and had duly and legally claimed, exemption from trial on the third or additional count, under the provisions of the Mahomedan Criminal Code, and that his trial before a Mahomedan law officer was consequently illegal and void. Sixth, that *Fyeesoolah* had vacated his appointment as law officer of the *Hooghly* Court, before the Petitioner was brought to trial upon the third count, in *December*, 1861, and was never duly re-appointed, or appointed Mahomedan law officer to conduct the Petitioner's trial. Seventh, that *Fyeesoolah* never accepted such appointment, or the responsibilities thereof, or delivered any *Futwa* as Mahomedan law officer, presiding at the trial of the Petitioner.

Eighth, that *Fyessoollah* was incompetent to act as law officer on the trial of the Petitioner, he never having taken the proper oath of office as law officer as prescribed by the Regulations; and ninth, that the *Futwa*, delivered by *Fyessoollah*, in December, 1861, was informal and void, not having been given under seal as is required by the Regulations. The petition then set forth that the *Sudder Nizamut Adawlut* overruled all these objections, and, that the case so made against the Petitioner, on the third or additional count, upon the evidence taken in December, 1861, was heard, on the 31st of March, 1862, when the Court convicted the Petitioner on the third count, and sentenced him to five years' imprisonment, with hard labour commutable for a fine of Rs. 10,000. That the Petitioner on the 3rd of April, 1862, presented his petition to the *Sudder Nizamut Adawlut*, praying for leave to appeal to Her Majesty in Council from the above conviction, and the several orders above-mentioned, whereupon the Court passed the following order:—"This Court is not required, nor warranted by law, to take any steps in criminal matters, which the parties concerned require to have brought before Her Majesty's Privy Council. Any application with that object must be made to the Judicial Committee of the Privy Council direct." The petition then stated that the Petitioner, who was at large on bail at the time of his conviction, had since surrendered himself, and was then undergoing his sentence in the jail at *Alipore*, and had paid the fine of Rs. 10,000, in place of being put to hard labour. And, after stating that no Charter, Statute, or Regulation existed, which in any manner regulates or limits the privilege of

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right of appeal, or the mode of exercising such privilege or right from the sentences or orders of the *Sudder Nizamut Adawlut*, in criminal matters, to Her Majesty's Honourable Privy Council, the Petitioner set forth the grounds upon which he contended that the proceedings and conviction were erroneous, and, among others, urged the following objections:—First, that a Sessions Judge had no power to order a committing Magistrate to add a new and substantive charge to the calendar, or to commit upon such a charge, the Magistrate not being a ministerial officer, but being bound to exercise a discretion, according to his own conscience, as to whether the evidence before him warranted him in committing a person accused before him upon a particular charge. That the *Sudder Nizamut Adawlut* had ruled, in the present case, under the Criminal Code in force in the Courts by which the Petitioner was tried, that the offence of causing or procuring the forgery of an instrument was a substantive offence, distinct from that of forging or uttering a forged instrument, and that no conviction of the crime first mentioned could have been had under the first or second count, upon which the Petitioner was originally committed. That the committing Magistrate had, consequently, in compliance with the orders of the Sessions Judge, sent up a charge against the Petitioner, which was never preferred before the Magistrate. Second, that supposing a Sessions Judge had the power to direct the Magistrate to commit upon a particular charge, such power was not duly exercised in the present instance. That the *Sudder Nizamut Adawlut* had distinctly declared that it was the duty of the Sessions Judge, under the

Circular Order, No. 70, of 14th of November, 1851, when, from the evidence given before him on the first two charges made against the Petitioner, he found that those charges were not established by that evidence, at once to have stopped the trial, and ordered the recommitment of the Petitioner on the third count, in addition to the other two, or to have acquitted the Petitioner on the two counts on which he had been charged, and directed his commitment on the third. That the trial, however, was not stopped, the Petitioner being required to plead to a new and substantive charge while his trial on the two former charges was proceeding, the result of which had been to give a pretext for depriving the Petitioner of his right to claim exemption from trial, according to the provisions of the Mahomedan Criminal Code, on the new charge. Third, that the Circular Order above referred to directs, that the Judge shall not exercise the power of remanding a prisoner before the Magistrate, with a view to a fresh commitment being made, except upon the "plainest and strongest grounds:" and that no such grounds existed in the present case was shown by the Judge having disapproved of the *Futwa* for the Petitioner's conviction, based upon the very evidence upon which he directed the fresh commitment. Fourth, that no proper proceedings were taken to procure the Petitioner's commitment upon the new charge; that when the Sessions Judge thought it expedient that the Petitioner should be committed on a new charge, he ought to have sent the Petitioner before the Magistrate, that the charge might be preferred against him, and the Petitioner examined thereon, and confronted with the prosecutor

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and witnesses while giving their testimony on oath in support of that charge, with an opportunity to the Petitioner to cross-examine them and produce evidence to rebut the charge. Fifth, that the Petitioner was never in fact committed or held to Bail to take his trial on the third count, and that the Sessions Judge was, therefore, without jurisdiction to try him upon that count; that the mere addition of a count to a calendar made in the absence of either the Prosecutor or the person charged, and under the simple initials of the committing Magistrate, wanted all the essentials of a valid commitment, and sets at nought all the decent formalities of criminal procedure. Sixth, that supposing the Petitioner to have been legally brought to trial on the third count, he was entitled to be acquitted thereon when the case was first referred to the *Nizamut Adawlut*, the Petitioner having pleaded to that count, and the *Futwa* of the law officer having been taken thereon, which *Futwa* was in the nature of a verdict, though not supported by any evidence. That the order of the *Nizamut Adawlut* of the 9th of July, 1861, which the Judges who passed it admitted to be without precedent, was in consequence illegal and improper, and that the Petitioner ought not to have been put a second time on his trial for the same offence. Seventh, that supposing the order of the 9th of July to have been legal, the Petitioner when brought to trial on the third count was entitled to claim, and did duly and legally claim, exemption from trial under the provisions of the Mahomedan Criminal Code. That the opinion of the Registrar of the *Nizamut Adawlut*, that it was then too late for the Petitioner make such claim, was erroneous, inasmuch as that Court by

remitting the Record for the purpose of having evidence taken on the third count virtually held, that all that had been done on the trial of that count, after the Petitioner had pleaded thereto, had been null and void; and, therefore, the Petitioner when brought to trial on that count in *December*, 1861, was in the contemplation of the law in the same position as if he had only that moment pleaded not guilty. That the Petitioner was debarred the opportunity of making such claim on the occasion of the former trial by the error of the Sessions Judge, in continuing the trial upon the first two counts; that the *Nizamut Adawlut* erroneously held that the Petitioner waived his right to claim exemption from trial on the third count, under the provisions of the Mahomedan Criminal Code, by going into a defence on the third count before the Mahomedan law officer on the occasion of the first trial. That the Petitioner was obliged on that occasion to go into his defence on the first two counts, and did so filing a written defence, that there was not a word in that defence which was not applicable to the first two counts, nor was any mention made of the third count in that defence. That the Petitioner was never in fact put to any defence on the third count, as no evidence had been given in support of that count, and the Petitioner denied that on that occasion he went into any defence on the third count beyond simply pleading "not guilty" thereto. That even if the Petitioner had done so, he submitted, that the trial in the third count after the Record had been remitted to the Sessions Court, was to all intents and purposes a new trial, and that the Petitioner when so brought to trial was entitled to all

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the rights conferred by the legislature on Hindoor, of claiming exemption from trial under a foreign code; and the Petition prayed for special leave to appeal from the above orders, and from the conviction, judgment, and sentence of the *Sudder Nizamut Adawlut*, and that that Court might be ordered to transmit forthwith the transcript of the proceedings and evidence upon which the Petitioner had been tried and convicted, to the Privy Council Office, and that Her Majesty would be pleased to direct that until the hearing of the appeal therein prayed for, the Petitioner might be admitted to bail, or until such other time as to Her Majesty might seem fit.

Mr. Bovill, Q. C., and Mr. Hannen, for the Petitioner.

This is a special application to Her Majesty for leave to appeal from the proceedings, and sentence of a Native Criminal Court, which have been confirmed by the *Sudder Nizamut Adawlut* on appeal, in a matter and under circumstances which would enable a party to obtain redress in a Court of Error in this country. The proceedings set out in the petition show that there was such irregularity as well as injustice, that a Court of Error would set them aside. Without entering upon the merits, we desire to show in the first place, that there is an appeal from this Criminal Appellate Court to the Queen in Council. It cannot be questioned that appeals to the Queen in Council in criminal matters are allowed, being expressly provided for by each of the several Charters creating the Supreme Courts at Calcutta, Madras, and Bombay, the Judges of those Courts having reserved to them a discretionary power to

grant such appeals, which power has been exercised. *Poonakkhoty Moodeliar v. The King* (a), *Aga Karboolie Mahomed v. The Queen* (b), *Nga Hoong v. The Queen* (c). The cases of *The Queen v. Eduljee Byramjee* (d), and *The Queen v. Alloo Paroo* (e), though cases in which leave to appeal was refused by the Court in India, are yet authorities showing that such an appeal lies, and that the Crown in cases from the Supreme Courts in India has not parted with its prerogative to entertain an appeal in a criminal suit, merely restricting the discretion of allowing such in the first instance to the Judges. The true question here is, whether the Crown has parted with that right in cases tried by the Native Criminal Courts in India. In *re Amos* (f), this Court entertained no doubt as to its jurisdiction to admit a criminal appeal from the *Cour Royale*, in the Island of Jersey, though it was afterwards discovered that such a power was restrained by an Ordinance of the Royal Commissioners of Queen Elizabeth, deated the 3rd of April, 1591. The history of the establishment of the *Nisamut Adawlut*, in India, whose proceedings we complain of, is to be found in the preamble to be the Ben. Reg. IX. of 1793. It is there stated to have been originally established in 1772, at *Moorshedabad*, "for revising the proceedings of the Provincial Criminal Courts in capital cases, and the Committee of Revenue at *Moorshedabad* were vested with a control over this Court, similar to that which the Collectors of the revenue were empowered to exercise over the Provincial Courts. Upon the abolition of the Committee

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- (a) 3 Knapp's P. C. Cases, 348. (b) 3 Moore's Ind. App. Cases, 164.  
(c) 7 Moore's Ind. App. Cases, 72. (d) 3 Moore's Ind. App. Cases, 468.  
(e) 3 Moore's Ind. App. Cases, 488. (f) 3 Moor's P. C. Cases, 409.

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of Revenue at *Moorshedabad*, the *Nizamut Adawlut* was removed to *Calcutta*, and placed under the charge of a *Darogah*, or superintendent, subject to the control of the President in Council, who revised the sentences of the Criminal Court in capital cases." It appears that the Court was afterwards re-established at *Moorshedabad*, but, by a subsequent Regulation, of the 3rd December, 1790, was again removed to *Calcutta*, and permanently established there by sec. 66, of *Ben. Reg. IX.* of 1793, the Regulation we are now considering. It appears, as well from the preamble as the subsequent parts of this Regulation, that there always was a controlling power reserved to and exercised by the Provincial Government, or its Officers, and from the whole tenor of the administration of criminal justice, it is clear that there was an appeal from the decision of this Court to some superior Tribunal; if so, then we submit, there must be an appeal to the Queen in Council, as the *dernier ressort*. The prerogative of the Crown in this respect has been carefully preserved. It is not affected by *Ben. Reg. XVI.* of 1797, respecting appeals from the *Sudder Dewanny Adawlut* in civil suits to the King in Council; the Statute, 21 *Geo. III.* c. 70, sec. 21, or in the Order in Council of the 10th of April, 1838 (a), made pursuant to the 3rd & 4th *Will IV.*, c. 41, sec. 24, which do not touch the criminal jurisdiction. We admit that there is no specific enactment in the above Regulation or Statutes, or in any other of the Regulations, respecting the Native Criminal Courts in India. *Reg. VI.* of 1796, sec. 2, gives the *Nizamut Adawlut* power to recommend to the Governor-General a mitigation of

(a) 1 Moore's Ind. App. Cases, p. IX.

punishment after the opinion of the *Futwa* of the law officer, which is tantamount to a liberty of appeal to the supreme authority, and that being so, makes our case stronger, for the right of appeal is but the exercise of the prerogative of the Crown to revise all legal proceedings, a right inherent in the Crown, and which cannot be abrogated except by the express will of the Sovereign, or by Act of the Legislature, to which the Sovereign is a party. *Bac. Abr. Tit. "Prerogative," B. 1; Chitty "On the Prerogative" p. 29.* And this is especially the case as regards the Colonies and Foreign possessions of the Crown: *Christiann v. Corren (a)*, and *Calvin's case (b)*. In *Reg. v. Cowle (c)*, Lord Mansfield says, "Upon imprisonments in *Guernsey* and *Jersey*, in *Minorca*, and in the Plantations I have known complaints to the King in Council, and orders to bail and discharge;" and Sir John Leach, in *Cuvillier v. Aylwin (d)*, declared that "The King has no power to deprive the subject of any of his rights." Again, in *Macfarlane v. Leclaire (e)*, and in *re Louis Marois (f)*, although the sum involved was in both cases under the appealable value restricted by the Canadian Act, 34th Geo. III., c. 6, sec. 30, yet leave to appeal was granted by this Court to prevent injustice. We submit, therefore, that no general restriction exists in respect to the power of the Crown to admit appeal, either in criminal or civil matters.

Secondly, the whole process in criminal prosecutions is directed and provided for by the Regulation IX. of

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(a) 1 P. Will., 329. See also, Memorandum, 2 P. Will., 75.

(b) Coke Rep., Pt. VII., p. 17. (c) 2 Burr. 856.

(d) 2 Knapp's P. C. Cases, 78. (e) 15 Moore's P. C. Cases, 181.

(f) 15 Moore's P. C. Cases, 189.



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1793. It is enough, however, for our present argument, to refer to the fifth and forty-seventh sections. The 5th section provides for the apprehension of offenders, and the manner in which the charge is to be preferred, as well as the form of the warrant. Now, none of the requisites there pointed out were complied with in the charge upon the third count against the Petitioner. The 47th section, which provides the manner in which the trial of prisoners is to be conducted, was equally disregarded. Upon these two grounds alone, which we are prepared to prove, we say that there is enough to entitle us to leave to appeal; there was sufficient irregularity to have invalidated a trial in any Criminal Court in this country, and by analogy there must be a remedy for such irregularity and injustice when committed in Her Majesty's dominions abroad. The irregularities complained of by the Petitioner as being contrary to the mode of conducting criminal procedure, prescribed by *Ben. Reg. VI. of 1832, secs. 5 and 6*, were presented in a form which would be equivalent to error on the Record in proceedings in the English Courts. He pleaded not guilty to all the charges, and never was heard as to his exemption from trial by the Mahomedan Criminal Code, as that Regulation provides. Again, the Mahomedan law officer was not qualified to try him to the third count of the indictment, and the whole proceedings, therefore, were *coram non judice*. In this country, whether in civil or criminal jurisdiction, where there is error upon the Record, the Sovereign has a right, by virtue of the supreme prerogative of the Crown as the fountain head of justice, to inspect the Record, and set it right. The same rule applies in respect to Colonial

Courts as to English Courts. In *Crawford's case* (a), a writ of *Habeas Corpus ad subjiciendum* issued from the Queen's Bench to the *Isle of Man*: to the Island of *Jersey* in *Carus Wilson's case* (b), and also in *Anderson's case* (c) to *Canada*. These cases show that the power of the Crown in the Colonies is not limited, and the right of the appeal from the Criminal Courts abroad has not been taken away or curtailed by any local Regulation or Imperial Statute. In *Rajunder Narain Rae v. Bijai Gouind Sing* (d), it was held that this Court had by the Common law, the same power as Courts of Record to rectify its judgments when mistakes had crept in by misprision or otherwise. Lastly, we submit, that the irregularity in the proceedings, and the injustice complained of in this case, is such as to render it a fit case for the exercise of the undoubted prerogative of the Crown to admit the appeal.

The Attorney-General (Sir W. Atherton) and Mr. Welsby, for the Crown.

The right of admitting an appeal in criminal cases is not an inherent part of the prerogative, of the Crown. The passage quoted from *Chitty*, "On the Prerogative," does not uphold the contention of the Petitioner's Counsel. It is founded upon *Chalmers' Opinions*, pp. 117, 202, and such a right has not been granted, so far as *India* is concerned, by any Charter or Regulation, having the force of law in *India*, to the subject, from a sentence of the *Sudder Nisamat Adawlut*; therefore, we submit, this Court has no power to grant this application. No analogy exists with respect to the jurisdiction exercised by the Court of Queen's

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(a) 13 Q. Ben. Rep., 613. (b) 7 Q. Ben. Rep. 984.

(c) 30 L. J. Q. B., 39.

(d) 2 Moore's Ind. App. Cases, 181.

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Bench in respect to writs of error, or *Certiorari* 4 *Coke's Inst.*, ch. 7. shows the origin of the jurisdiction of that Court. The Court of Queen's Bench is not a final jurisdiction, for a writ of error lies to the House of Lords. With respect to the Regulations in force in India relied upon by the Petitioner, they do not give the jurisdiction contended for. From the year 1799 to the year 1801, the Governor-General and members of the Supreme Council, constituted the *Nizamut Adawlut*, as well as the *Sudder Dewanny Adawlut Ben. Reg. VI.* 1793, sec. 2, and, by *Regs. IX* of 1793, sec. 67, and *XLIX.* of 1795, the Governor and Council are to be assisted by a *Casi* and *Mufties*. This state of affairs was altered by *Reg. II.* of 1801, sec. 10, by which the *Nizamut Adawlut* was composed of a member of the Supreme Council, two Puisne Judges, and two native law officers. Section 16, provides for appeals to the King in Council in civil cases, and for reference to the Governor in Council, but no farther. The constitution of that Court was afterwards modified by *Ben. Regs. XV.* of 1807, sec. 3, and *XII.* of 1811, and by *XXV.* of 1814, power is given to a single Judge to sit in the *Nizamut Adawlut*. No mention is made of appeals in criminal matters to England, in any of these Regulations. Statute, 21st *Geo. III.*, c. 70, sec. 21, provides for appeals in civil cases to the King in Council, where the subject-matter in dispute shall be of the value of £5,000, and the provisions of that Statute, in respect to appeals in civil matters from the *Sudder Dewanny Adawlut*, are introduced by *Ben. Reg. XVI.* of 1797. If, then, the Crown ever had the prerogative contended for by the Petitioner, before the passing of the above Statute, we maintain that it has since been parted with by Statute

*The Queen v. Eduljee Byramjee (a), The Queen v. Alloo Parro (b).* In the latter case, Lord Brougham doubts the authority of *Christian v. Corren*, as it was the reasoning of the Reporter himself who was Counsel in that case, and not the judgment of the Court (c).

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No judgment was then given, and the attention of their Lordships having been afterwards drawn to the Act of the Indian Legislature, No. XXV., of 1861, sec. 414, which enacts that, "unless otherwise provided by this Act, or any other law for the time being in force, no appeal shall lie from any order or sentence of a Criminal Court," their Lordships directed the petition to be argued upon the effect of the section of that Act.

Mr. Bovill, Q. C., and Mr. Hannen, were heard upon this point.

First, we contend that the words of the Act of the Indian Legislature, No. XXV., of 1861, sec. 414, do not apply, or assuming that they do, we submit that the Act does not take away the right of appeal claimed by the Petitioner, for not having received the sanction of the Crown, as required by the Imperial Statute, 16th & 17th Vict., c. 95, sec. 26, that Act was *ultra vires* and void, so far as it affects the prerogative of the Crown. There is no power in the Indian Legislature to interfere with the prerogative of the Crown, without its consent. In this country no Bill can be brought in affecting the prerogative without the consent of the Crown. [The Respondent's Counsel interposed, and cited upon

(a) 3 Moore's Ind App. Cases, 468.

(b) *Ib* 494.

(c) 1 P. Will, 329.

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this point the Imperial Statute, 24th & 25th *Vict.*, c. 67, s. 24, which enacts, that no Law or Regulation made by the Governor-General in Council should be deemed invalid by reason only that it affects the prerogative of the Crown, and contended that such Statute was retrospective.] By the 54th section of that Statute, it is enacted, that it is not to come into operation till its publication by the Governor-General in Council by proclamation, which event did not take place till the 16th of *November*, 1861, after the passing of the Act, No. 25, of 1861; therefore, though the clause in question prevented the whole of any Act which contained a clause interfering with the prerogative from being avoided, it did not legalize such interference itself. It cannot be denied that the prerogative of the Crown can only be taken away by express words, which are not to be found in the Act, No. XXV., sec. 414, of 1861. It has been so held with respect to the right of *Certiorari*, *The King v. The inhabitants of Cumberland* (a), *The King v. Eaton* (b), *Groenvelt v. Burwell* (c), *The King v. Fukes* (d), *Rex v. Moreley* (e), *The King v. Allen* (f), *Smith v. The Commissioner of Sewers* (g), *Rex v. Lewis* (h), *The King v. Hanson* (i).

The Attorney-General (Sir *W. Atherton*), Mr. *Forsyth*, Q. C., and Mr. *Welsby*, appeared for the Crown, but were not called upon to address their Lordships.

Judgment was delivered by

(a) 6 Term Rep., 194.

(b) 2 Term Rep., 89.

(c) 1 Lord Raym., 409.

(d) 8 Term Rep., 542.

(e) 2 Burr., 1048.

(f) 15 East, 333.

(g) 1 Mod., 44.

(h) 4 Burr., 2459.

(i) 4 Barn & Ald., 519.

Dr. LUSHINGTON:

It appears from the proceedings in the case that a person of the name of *Joykissen Mookerjee*, has been convicted of a criminal offence, namely, of having procured leases of certain property to be forged. The questions for the decision of their Lordships are, first, whether, as has been argued, there exists on behalf of the Crown, a prerogative right of appeal even in matters of criminal jurisdiction; and, secondly, whether this is a proper case in which the authority of the Crown should be interposed for the purpose of doing justice.

Now, with reference to the existence of the prerogative of the Crown, their Lordships are desirous that no expression should fall from them which in the slightest degree would throw doubt on the existence of that prerogative, not only under the existing circumstances, but in others which might arise, with reference to the other dominions of the Queen which may have been acquired by conquest. They do not think it necessary that they should, on the present occasion, enter minutely into the considerations upon which the prerogative of the Crown is founded. They think it will suffice for the purpose of this case, to assume that it does exist, and, consequently, that it is in the power of the Judicial Committee of the Privy Council, exercising that prerogative right under the Crown, so to advise Her Majesty, if they should think an appeal ought to be allowed on the present occasion.

With regard to the merits of the case itself, their Lordships certainly are inclined to come to the conclusion that justice has not been very well administered in the present case; and, supposing it to

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have been a civil, and not a criminal case, they would have had no hesitation whatever in recommending to Her Majesty to allow an appeal for the purpose of considering these proceedings, and of doing justice to the party complaining.

But this is a criminal case, and subject to very different considerations. Admitting, therefore, two things—admitting the existence of the prerogative of the Crown, and admitting that this, *prima facie* and presumptively, is a case of great grievance—their Lordships have now to determine whether, looking at all the circumstances attending the granting of appeals in criminal cases, it would be their duty to advise Her Majesty to grant this appeal or to withhold it.

We must recollect, in the first place, that by granting an appeal is meant an examination of the whole of the proceedings which have taken place. It is not simply for the investigation of any legal question which might have arisen; it is for the purpose of examining the whole of the evidence, and the whole course of the proceedings upon the trial, to enable us to come to a conclusion upon the merits.

Now, it is of no small importance to bear in mind that notwithstanding the numberless instances in which an application of this kind might have been made to the Queen in Council from all the various dominions subject to Her Majesty, from all those parts of Her dominions that were acquired by conquest, and where Her Majesty has the entire sovereign power of legislating according as she may think fit, either by Orders in Council, or, as was determined on a former occasion, by virtue of Letters from the Secretary of State, it is, I say, to be borne

in mind that, in no instance whatever, of any grievance however great, at any time, has any attempt ever been made to apply to Her Majesty for leave to appeal in a criminal case.

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We can easily call to memory very many instances which have occurred in the Colonies in which it has been alleged that gross injustice has been done, and even lives sacrificed where they ought not to have been exposed to any danger; but no precedent of an appeal of this nature has existed; and we think it is obvious, upon the least consideration of the consequences, how it is that no such precedent has existed, and how it is that no such precedent would have been created, even if an attempt had been made to call into force the power of the Crown. It may be true that on some occasions it is not very desirable to argue simply from consequences alone; but the consequences of granting an appeal in cases of this description are so exceedingly strong, they are so entirely destructive of the administration of all criminal jurisprudence, that we cannot for a single moment doubt that they are of the greatest importance in guiding us to form a judgment.

Now, if we were to advise Her Majesty to grant an appeal on this petition, how would the case stand? It is simply the case of an individual having been convicted of causing documents to be forged. Would not the same right apply to capital cases? What could be done in a capital case? Is there any distinction which can be drawn? If the prerogative of Her Majesty gives this individual the right of appeal, could any rules or regulations be imposed whereby the right of appeal could be governed or could be restricted? So you would go through the whole



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catalogue of cases, and there is no doubt whatever that whenever punishment was likely to ensue there would follow an appeal to Her Majesty in Council, and consequently not only would the course of justice be maimed, but in very many instances it would be entirely prostrated.

These are the reasons which operate upon our minds in rejecting this application: not at all forgetting that injustice may have been done in this individual case, and not at all forgetting that the power of the Crown may be invoked in another shape, and that that injustice may be remedied. Their Lordships are of opinion that they cannot, under the existing circumstances, advise Her Majesty to admit this right of appeal, but they doubt not that justice will be done, because they would suggest that an application should be made to the constituted authorities who have the power to afford a remedy, though in a different way. They doubt not that when it is represented to those authorities that this suggestion emanates from the Judicial Committee, they will not be loth to examine into the circumstances of the case, and to do that which justice may require.

We have only one word more to say on the present occasion. Their Lordships do not think it necessary to enter at all into the question which has been discussed at the bar this morning; it would require a very nice examination of the Statutes and the criminal law of India, which could only end in the same way. Whatever might be the result of that examination, we have no hesitation in saying the course we are now about to adopt would be the course we should then recommend Her Majesty to pursue.

We cannot grant this application.

# CASES

IN  
THE PRIVY COUNCIL  
ON APPEAL FROM  
THE EAST INDIES.

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CHARLOTTE ABRÁHAM and DANIEL } *Appellants,*  
VINCENT ABRAHAM ... }

AND

FRANCIS ABRAHAM *Respondent.\**

*On appeal from the Sudder Dewanny Adawlut at  
Madras.*

THE principal question involved in this appeal was as to the law which governed the succession to the property of the late *Matthew Abraham*, a Protestant native of *India*, resident in the *Madras* Presidency, and who died intestate in the year 1842. The ancestors of *Matthew Abraham* for several generations

17th, 18th  
19th & 20th  
Feb., 1863.

The *status* of Native Christians, known as "East Indians," and the law of inheritance and succession, as administered in the *Mofussil* Courts in respect to their rights and property, considered.

\* Present : Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge

*Assessors*,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

*Mad. Reg. II. of 1802, sec. XVII. provides that in cases coming within the jurisdiction of the Zillah Courts, for which no specific rule may exist, the judges are to act according to justice, equity and good conscience; and Mad. Reg. III. of 1802, sec. XVI. cl. 1, prescribes, that in suits before the Native Courts regarding succession, inheritance,*

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had been Christians; and *Matthew Abraham*, who had been baptized in infancy in the Roman Catholic faith, but afterwards became a convert to the Protestant religion, married a European wife in the year 1820, and with her and the children of the marriage conformed in all respects to the language, dress, manners, and habits of English persons up to the time of his death. The *Sudder Court* at *Madras* held that the property should be distributed in accordance with the Hindoo law.

The circumstances of the case, were as follows:—  
 In the year 1812, *Matthew Abraham*, then a youth,

caste, &c., the Hindoo law with respect to Hindoos, and the Mahomedan law with regard to Mahomedans are to be considered the general rules by which the judges are to form their decisions. Held, that the latter Regulation applied to Hindoos and Mahomedans, not by birth only but by religion.

Held, also, in a case of succession to the estate of a deceased of pure Hindoo blood, who had married a European wife, professing, with his family, the Christian religion, and whose ancestors for generations had embraced Christianity, that such case was within the provisions of *Mad. Reg. II* of 1802, sec. XVII., and was to be decided by reference to the usages of the class to which the deceased attached himself and the family to which he belonged.

Upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert.

The convert may renounce the old law by which he was bound, as he renounced his old religion, or if he thinks fit, he may abide by the old law notwithstanding he has renounced the old religion. For though the profession of Christianity releases the convert from the trammels of the Hindoo law, yet it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interest in, and his power over, property. The convert, though not bound as to such matters, either by the Hindoo law, or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended his rights to be governed. He may do so either by attaching himself to a class which in this respect has adopted and acted upon some particular law, or by having himself observed some particular law, family usage, or custom.

The *lex loci* Act, No. XXI. of 1850, held not to apply where the parties have ceased to be Hindoos in religion.

The *status* of a member of an undivided Hindoo family who became a convert to Christianity, in reference to partnership, considered. Such circumstance held to amount, by the Hindoo law, to a severance of partnership.

Whenever an opinion of the Pundits is required by the Court, and there are any special circumstances which may bear upon the question to be submitted for their opinion, these special circumstances ought to be submitted to the Court in the case submitted to the Pundits.

by her were fraudulently fabricated at her instance ; and that not only the alleged Will was not executed or sealed by the deceased, but that he was in a state of insensibility at the date thereof, and further that the alleged deed of relinquishment was not executed by the Respondent. The Appellant put in evidence the Will of *Mirsa Abdoola Begg*, and the deed of agreement, dated the 2nd of *October*, 1846, said to have been executed by the Respondent, and filed depositions of witnesses, taken in the proceedings respecting the administration of *Mirsa Abdoola Begg's* estate, to prove the Will ; and, further, that she was the lawful wife of *Mirsa Abdoola Begg's*, regularly married to him, with a dower of Rs. 51,000 ; that he had repeatedly acknowledged her as his lawful wife ; that the deed or Will was made by *Mirsa Abdoola Begg* on the 2nd of *November*, 1846, and registered before his death ; and that the Respondent had acknowledged the agreement of the 2nd of *October*, 1846, and received an allowance of Rs. 15. It was not satisfactorily shown by the Respondent's witnesses that the Appellant even took the Rs. 25,000 alleged by her from the house of *Mirsa Abdoola Begg*.

The hearing of the suit took place before *H.G. Astell*, Esq., the Judge of the Civil Court of *Jounpore*, and by the decree of that Court, dated the 3<sup>rd</sup> of *April*, 1861, the evidence given by the Appellant, with reference to her claim as widow, was observed upon as follows:—"With respect to her marriage with the deceased, the Defendant, *Hosein Buksh*, has grounded her proof on the depositions of thirteen witnesses, who were examined by the Judge of *Benares*. Their statements are to the effect that, although *Hosein Buksh* was originally a professional prostitute, and in that character first formed her connection with

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the deceased, that about twenty years ago the deceased regularly married her. Some of these witnesses describe themselves as eye-witnesses to the ceremony, and others deposed to having heard deceased on several occasions acknowledge that he had married her. These depositions, however, have not at all satisfied me that any marriage took place, or that the Defendant, *Hosein Buksh*, was ever looked upon, or considered in the light of a wife, either by the deceased or by the brotherhood. It is remarkable that the persons who are stated to have assisted at the ceremony, *i.e.* those of rank or position, are dead; whilst it cannot but be considered as prejudicial to this plea of the Defendant, that she has considered it necessary to get a Will executed in her favour by the deceased when he was certainly very ill, and very near his death. I am of opinion, that *Hosein Buksh* has no claim as a wife of the deceased." The judgment then dealt at considerable length with the depositions filed by the Appellant in respect of the Will, under which she claimed as sole devisee, and the Judge concluded by finding against the Will, declaring that he rejected it on the oral evidence filed by her in support of it. "This evidence is, I consider, worthless in the extreme, and bears falsehood on its face. The witnesses, with a view of showing that the deceased was sensible to the last, have all stated that the deceased's (*Mirsa Abdoola Begg's*) complaint was consumption; but many of them detail at length how, just before the Will was made, the deceased gave long detailed instructions for its preparation, how he called for his spectacles and put them on, and how he was too weak to either sign his name or affix his seal, which was then affixed by another party. I reject this Will *in toto*." The judgment then observed on the evi-

dence 'in support of the deed of relinquishment alleged to have been signed by another person for and on behalf of the Respondent, and declared against it, stating that it was the opinion of the Court that the witnesses examined in support of the deed had all perjured themselves. The judgment also declared that the Defendant, *Rujjee Khanum*, had been a prostitute by profession, and had failed in proving that she was ever married to *Mirsa Abdoola Begg*, or that her daughter, the Defendant, *Imamum*, was his child. The Respondent's claim of Rs. 25,000 was disallowed by the judgment, which decreed to the Respondent the whole of the property left by the deceased *Mirsa Abdoola Begg*, with costs.

The Appellant appealed to the *Sudder Dewanny Adawlut* at *Agra*, and the other two Defendants, *Rujjee Khanum* and her daughter, *Imamum*, also appealed against the decree.

On the 23rd of *August*, 1862, the two appeals were heard together, by *Alexander Ross* and *William Roberts*, Esqrs. Judges of the *Sudder Dewanny Adawlut*, and they delivered the judgment and decree of the Court, and stated at length their reasons, thereby affirming the decree of the Judge of the Civil Court of *Founpoor*, and dismissed both the appeals with costs. In their judgment the Judges commented on the proofs filed by the Appellant as follows:—  
 "We would observe *in limine* that a great deal of the evidence of witnesses taken in a miscellaneous case relative to the party entitled to administer to the estates of the deceased *Mirza Abdoola Begg*, has been received in this case, without the examination of these witnesses *de nove*. But we think the Judge should not have contented himself with copies of depositions, but should have insisted on the parties

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formerly examined being again produced, unless it could be shown that they were unable to attend. It was necessary that these witnesses should again have been subjected to a rigid examination, so that all the light which could have been thrown upon the circumstances of the deceased should have been brought to bear on this suit. Still, as the inadmissibility of such secondary evidence was not urged in the Lower Court, we have thought proper to allow it to weigh in this instance, *valeat quantum*. The decree declared, as well on the last-mentioned evidence as on the other evidence in the appeals, against the Appellant and her co-Defendants on each of the issues, negating the alleged two marriages respectively, the alleged Will of *Mirsa Abdoola Begg*, the alleged deed of relinquishment of the Respondent, and the paternity of the Defendant, *Inamum*.

The appeal was brought by the Appellant alone from this decree of affirmance.

The Attorney-General (Sir John Rolt, Q.C.),  
 and Mr. Almuric Rumsey, for the Appellant.

The evidence given by the witnesses establishes, according to the Mahomedan law, the ceremonies of a regular marriage between the Appellant and the late *Mirsa Abdool Begg*, and consequently her title as widow and one of his heirs to the whole or part of his estate. Too much weight was attached by the Courts below to the irregular life the Appellant had led previous to being taken into *Mirsa Abdoola Begg's* house. His treatment of her, and her acknowledged character as a wife by the family, was enough to satisfy the requirements of the Mahomedan law, even in the absence of proof of a regular marriage, to raise the presumption that she was married to him.

By the Mahomedan law marriage will be presumed or inferred from cohabitation. It differs from the Scotch law of marriage by habit and repute; *Bell's Dict., voce* "Habit and repute," p. 459 [Ed. 1838]; *Erskine, B. I. tit. 6, s. 6*; as the latter law presumes a pre-existing contract, but no contract or ceremony is necessary by the Mahomedan law (a). Marriage has been presumed from cohabitation alone, and legitimacy of child arising from that presumption established: *Mahomed Barker Hoossian Khan v. Shurfoon Nissa Begum* (b); *Khajah Hidayut Oollah v. Rai Jan Khanum* (c); *Macnaghten's Princ. of Moohummudan Law*, p. 58. There can exist no distinction between cases of marriage where there is no child born and the principles with respect to presumption of marriage and legitimacy of child laid down in those authorities. [Sir RICHARD T. KINDERSLEY: Is there any case of a woman who had been a Nautch girl, or prostitute, having from cohabitation been held to be a wife?] It is admitted that the *status* of a concubine and the *status* of a wife are different; but if for a long period a concubine is treated as a wife and so acknowledged, she acquires the *status* of a wife. The strictness of seclusion generally adopted by a Mahomedan wife is not adopted in every case.

Next, we contend, that the deed or Will of *Mirza, Abdoola Begg*, dated the 2nd of November, 1859 was proved to have been duly executed by him when he was of testamentary capacity, registered on the same day, and operated either as a gift, *inter vivos*, or

(a) See Baillie's Dig. of Mooh. Law, p. 4 [Ed. 1865], from which it appears that offer and acceptance is a necessary condition.

(b) 8 Moore's Ind. App. Cases, 136.

(c) 3 Moore's Ind. App. Cases, 295.

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as a general devise or bequest, or the extent allowed by Mahomedan law, namely, of one third: *Hedaya*: Vol. 4, p. 468-9; *Mussummat Soobhanee v. Bhetun* (a). It bears internal evidence of truth. The consent of kindred to a Will does not extend to distinct kindred like the Respondent. Apart from any question as to the validity of this instrument, the Appellant is entitled to her dower of Rs. 51,000 as a primary charge on the estate of her late husband.

In any circumstances, the Respondent, as widow of *Mirsa Abdoos Sumud Begg*, could be entitled only to a distributive share of his estate. There is no proof that she was the adopted daughter of *Mirsa Abdoola Begg*, and her only claim could be as one of his distant kindred. She can have no title whatever as long as any sharer is in existence. *Macnaghten's* "Princ. of Moohummudan Law," pp. 8, 53.

Sir. *R. Palmer, Q.C.*, and Mr *Leith*, for the Respondent, were not called on to address their Lordships.

Their Lordships' judgment was delivered by

The Right Hon. Sir JAMES W. COLVILE:

24th Feb.,  
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This is an appeal from a decision of the late *Sudder Dewanny Adawlut* of the North-western Provinces of India, which affirmed a decision of the local Court of *Jounpoor* in favour of the Respondent, the Plaintiff in the suit. The Plaintiff sought to recover certain movable and immovable property specified in her plaint "by right of inheritance to *Mirsa Abdoola Begg*, her uncle and ancestor, and also to *Mirsa Sumud Begg*, her husband." The plaint con-

(a) 1 Ben. Sud. Dew. Rep. 347.

tained a detailed description of the property sought to be recovered. The principal Defendants were *Mussumat Hosein Buksh*, *Mussumat Ruzzee-ool-Nissa*, alias *Rujjee Khanum*, and *Mussumat Useen-ool-Nissa*, alias *Mussumat Imamum*.

The first and second-named female Defendants claimed each to be a widow of the deceased *Abdoola*, but each denied that the other was ever married to *Abdoola*, each alleging the other to have been his mistress and not his wife. The third female Defendant claimed to be the legitimate daughter of *Abdoola* by his alleged wife, her mother, the second female Defendant. The first female Defendant, the present Appellant, also set up a Will alleged to have been made in her favour by *Abdoola* the day before his death, by which he bequeathed to her, by the description of "my married wife, *Mussumat Jariut-ool-Butool*, alias *Bebie Hosein Buksh*," all his movable and immovable property, subject to certain provisions in favour of the Plaintiff, to which it is not necessary to allude further. The validity of this Will was disputed both by the Plaintiff and by the second and third Defendants. The Civil Court decided against the Will, and also against both the alleged marriages, and the alleged title of the third female Defendant. On appeal to the *Sudder Dewanny Adawlut* the decision was affirmed. The first female Defendant alone has appealed to Her Majesty in Council from the decision of the *Sudder Dewanny Adawlut*. The second and third Defendants have not appealed, and, therefore, their interests are put out of the case entirely.

In the case of *Naragunty Lutchmeedavannah v. Vengama Naidoo* (9 Moore's Ind. App. Cases, 87),

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their Lordships said: "It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence, or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion, it must be shown very clearly that they were in error in order to induce us to alter their judgment."

Their Lordships, after a very careful attention to the evidence, and to the arguments addressed to them on the part of the Appellants, are of opinion, that there is wanting in this case that clear indication of error in finding against the marriage and the Will which would be necessary to take this appeal out of the operation of the above salutary rule.

The *Sudder* Court thought the evidence as to the marriage of the Appellant insufficient. The same Court concurred with the Court below in thinking the evidence in support of the Will untrustworthy. They say, "We concur with the Judge in discrediting the evidence in support of the Will. We consider the attendant circumstances altogether improbable and unworthy of belief."

Is error clearly manifest in these conclusions? Is the evidence clearly sufficient to prove either issue? The claim to be declared the wife of the deceased would establish, on oral testimony, a heavy charge on the estate of a deceased person to the amount of Rs. 31,000, and the Will is one made *in articulo mortis*. Some of their Lordships can judge, by their experience of precedent cases before this Committee, of the dangers likely to ensue if the Courts of

*Matthew Ibrahim*, acted as the agent of the Plaintiffs, and that the *Abkarry* contract in 1843 was taken by the Respondent after communication and with the consent and permission of the Appellant, *Charlotte Abraham*. That the Plaintiffs were not Hindoos or subject to Hindoo law, and they denied that they were regarded as Hindoos by law. That the Respondent had been in the habit of Honouring drafts drawn by the Appellant, *Charlotte Abraham*, upon him as manager of the distillery, and had advanced moneys from the distillery to other persons at her request and against his own inclination, and that such conduct was inconsistent with the assertion that the Plaintiffs had been supported by him out of charity. That the Plaintiffs never opposed the Respondent with respect to the *Abkarry* contract, because for several years after *Matthew Abraham's* death they believed that the Respondent was acting and considered himself as acting as their agent in obtaining the contract, and that the Plaintiff, *Charles Henry Abraham*, was in total ignorance of the actual position of affairs until *September*, 1852, and he took proceedings in the suit immediately upon his return to *India* in *June*, 1853. That the Plaintiffs were not in possession of the property of *Matthew Abraham*, with the exception of a dwelling-house, bungalow, furniture, plate, &c., and that their possession of any of the property was inconsistent with the Respondent's claim to be the sole head and representative of the family.

The rejoinder of the Respondent admitted that parties in his position had no *status* which fell under any particular law, and adduced several reasons with a view to show that the law which should govern the case was the Hindoo and not the English law.

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On the 12th of *March*, 1855, the cause came on before Mr. *Story*, the then Civil Judge of *Bellary*, and he proceeded to adjudicate upon the two preliminary objections taken to the plaint by the Respondent in his answer; namely, that the Appellant, *Charlotte Abraham*, had been improperly made a co-Plaintiff, and that the property claimed had not been specified in the plaint in accordance with *Mad. Reg. III. of 1802*; and upon both of these objections the Civil Judge was in favour of the Respondent, and made a decree non-suiting the Plaintiffs, with costs.

From this decree the Plaintiffs appealed to the *Sudder Adawlut*, and that Court, by an order, dated the 20th of *August*, 1855, after stating that the Civil Judge might have required the Plaintiffs to amend their plaint by stating the particulars of the property, directed the Civil Judge to proceed to dispose of the suit on its merits. The *Sudder* Court appended to the above order the following instructions to the Civil Judge:—"The Court have to notice that the Civil Judge has pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties are to be bound, without receiving any evidence whereby to govern his judgment on the subject. Such a question can only be rightly pronounced upon, on consideration of the usage of persons situated as the parties who are described as Christians whose ancestors are of Hindoo stock, and the usage in their particular family as indicated by the acts of the parties and their predecessors, in respect of their property since they have belonged to the Christian community. It will be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine

whether it was the self-acquired estate of the deceased, *Matthew Abraham*, or of ancestral origin, after which the rights of the parties thereto, whether under English or Hindoo law, should be declared.

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The suit accordingly came again before the Civil Court, and by an Order of that Court dated the 30th of *November*, 1855, the Plaintiffs were required to amend their plaint by stating the particulars of the property. This order the Plaintiffs were unable to comply with, as they were ignorant of the particulars, and the Civil Court dismissed the suit with costs by an Order dated the 11th of *January*, 1856.

Upon appeal to the *Sudder Adawlut* this Order was set aside, upon the ground that in a suit like the present; wherein the particulars of the property sued for were to be known only by information to be furnished by the Defendant, the proper course for the officiating Civil Judge to have taken would have been to seek this information at the Defendant's hands.

The suit was accordingly replaced on the file of the Civil Court, and the following points were recorded for proof by Mr. *Irvine*, the Civil Judge:—General point. First, each party should prove the practice of 'families similarly situated to theirs, whether to adhere to the Hindoo law of inheritance, or to be governed by the law of *England* in that respect. Secondly, each party should also prove what has been the practice of their own family in this respect as shown by their acts.

The Plaintiffs to prove, first, that Defendant's father died insolvent, and that *Matthew Abraham* took charge of the Defendant then a child, as stated in the

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plaint. Second, that a considerable sum of money was expended by *Matthew Abraham* on the *Abkarry* buildings. Third, the nature and extent of the property left by *Matthew Abraham*. Fourth, that the Defendant on *Matthew Abraham's* death was continued in the management of all his estate on the terms mentioned in the plaint, and that he took the renewal of the *Abkarry* contract for the remaining months of the year in which *Matthew Abraham* died and in subsequent years, as stated by them. Fifth, that the first Plaintiff lent money from the distillery funds against Defendant's inclination; and by a supplemental point, directed him to prove that *Matthew Abraham* kept regular accounts of the distillery business.

The Defendant to prove, first, that his father died possessed of property and that *Matthew Abraham* took possession of it. Second that the shop was established as stated, and that he and *Matthew Abraham* raised capital for it by borrowing money jointly for it. Third, that the money deposited with the Government as security for the *Abkarry* rent was made up from the sums received from the petty renters, and that that money was used as stated in the answer. Fourth, that the first Plaintiff requested that the third Plaintiff should be admitted as a partner in the *Abkarry* contract. Fifth, that on *Matthew Abraham's* death the Defendant became the legal head of the family, and as such continued in possession of the estate. Sixth, that he obtained after *Matthew Abraham's* death the *Abkarry* contract for his own exclusive benefit, and that he was legally entitled so to do. Each party were to be at liberty to disprove the points given to the other.

Both parties entered into voluminous evidence,

and a great many witnesses were examined on behalf both of the Plaintiff and the Defendant.

The documents adduced by the Plaintiffs consisted chiefly, of correspondence between the Respondent and *Matthew Abraham*, generally during the life of *Matthew Abraham*; and the correspondence between the Respondent and others after the death of *Matthew Abraham*. From the correspondence during the life of *Matthew Abraham*, it appeared that he and the Respondent acted 'in all respects like English persons, being wholly inconsistent with the allegations of the Respondent, that there was a general unity of interest between him and *Matthew Abraham*, and that they were undivided Hindoo brothers. The correspondence after the death of *Matthew Abraham* included a long letter addressed by the Respondent to the late *Charles Henry Abraham*, dated the 19th of August, 1842, shortly after the death of *Matthew Abraham*, lamenting the great loss he had sustained, and the consequent alteration in his situation, and in which he set forth a statement of the affairs and general assets of the deceased, without making any claim, or allusion to a claim, on his own behalf to any interest therein, except as the general manager of the property, and soliciting the aid and interest of *Charles Henry Abraham* to procure from his mother (the Appellant) a continuance of his agency, or some provision for his future support; the remainder regarded the power of attorney and letters of administration before stated, and the accounts between the Plaintiff and Respondent.

In addition to the correspondence, documentary evidence was adduced by the Plaintiffs, showing the admission of the Respondent as a partner with

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*Matthew Abraham* in the shop, on the 2nd of *April*, 1832, with entries from the distillery cash book, showing drafts from the distillery funds according to the orders of the first Plaintiff, both before and after the death of *Matthew Abraham*. They put in evidence, also, translation of a bond executed by two persons to *Matthew Abraham*, therein described as "Contractor of the entire *Talook of Bellary*," and an abstract of the distillery accounts, rendered to the first Plaintiff by the Respondent, together with the letters of administration before mentioned, and a receipt by the Appellant, the widow, as "Administratrix to the estate of the late Mr. *M. Abraham*," and by the Respondent, as her attorney, in respect of debts due to *Matthew Abraham's* estate. The Plaintiffs filed also a return of particulars respecting the *Abkarry* contract, showing the continuance of the same deposit after *Matthew Abraham's* death, and other matters as to the renewals by the Respondent; accounts of the distillery brought in by Respondent upon being called upon to do so—such accounts showing the payments made to the Appellant, the widow, up to the institution of the suit. Two witnesses, Englishmen, and two native Christians who had been well acquainted with *Matthew Abraham's* father, and with *Matthew Abraham*, when a youth, were examined by the Plaintiffs, who proved that *Matthew Abraham's* father, was in a state of poverty up to the time of his death, and that *Matthew Abraham* had been appointed to a post in the Arsenal at *Bellary*, independently of any exertion of his father on his behalf, and had not come into possession of any property upon his father's death. Many other witnesses, who had been intimately acquainted with *Matthew Abraham* and the Respondent,

proved that the Respondent was a dependent upon *Matthew Abraham*; that he had never been treated by him or other members of the family as if he were in the position of an undivided brother, and ultimately to become the head of the family; that his partnership with *Matthew Abraham* was limited to the shop; that *Matthew Abraham* and the Respondent never adhered to a single Hindoo custom or usage; that the usage and habits of *Matthew Abraham* and his family, and of the Respondent, were entirely opposed to Hindoo law or customs; and that there was no difference whatsoever between their mode of life and that of any English, or East Indian family, but that, on the contrary, they were always looked upon as members, and even leading members, of the East Indian community, and that they were associated with Englishmen and East Indians in all matters of religious, public, social, and private interest. It was further shown by the evidence of other witnesses, well acquainted with the religion and customs of the different classes, that the only class of persons whose *status* and position presented a clear analogy to that of *Matthew Abraham*, were the East Indians, who, strictly so called, were the descendants of a European and a native, or half-caste and, who, when adhering to English habits and customs, were governed by English law, and that that class had not hesitated to admit and recognize both *Matthew Abraham* and the Respondent as members thereof. It was also proved that, after the death of *Matthew Abraham* up to Christmas, 1853, the *Arrack* vendors came to the house of the first Appellant, *Charlotte Abraham*, every Christmas to pay their respects or do homage to her as the representative of *Matthew Abraham*, and as such at the

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head of the distillery, and that the Respondent was present on many such occasions. Four persons, who had been connected with the distillery during the lifetime of *Matthew Abraham*, deposed to the fact of *Matthew Abraham* having been solely entitled to the distillery; that accounts were regularly made up for and kept by him, and that the Respondent had no power at the distillery or over the persons employed therein, save such as was delegated to him as manager by *Matthew Abraham*.

The Respondent was called as a witness for the Plaintiffs, and examined at great length. He stated, amongst other things, that he was admitted a partner in the shop in 1832, under a deed of partnership, which he could not produce; that he was never admitted by *Matthew Abraham* as partner in the distillery business by any deed, but he alleged that *Matthew Abraham* had acknowledged that he and the Respondent were joint proprietors of the distillery business; he admitted that he did not, upon *Matthew Abraham's* death, close accounts or pay over to the Plaintiffs *Matthew Abraham's* interest in the distillery; that he made no valuation for the transfer to him of the distillery business; that he continued to work the distillery business with the stock and funds that were invested in it at the time of *Matthew Abraham's* death; that he did not on *Matthew Abraham's* death give the Plaintiffs intimation that he would carry on the *Abkarry* contract business for his own exclusive benefit; that *Matthew Abraham* and the Respondent had not an equal interest in the distillery business as to shares; that *Matthew Abraham* was the sole contractor, and the Respondent contributed his labour; that he kept no regular account of the property

which, was in his possession at the death of *Matthew Abraham*; that he considered that, during the life of *Matthew Abraham*, he had a proprietary interest in all his property; that he laboured jointly with *Matthew Abraham* in the contracts for several years previous to his death, and did nearly all the business for several years, and, therefore, claimed a share in it; that the Appellant, the widow, had made several demands for accounts from the Respondent in different years; that he did not furnish any capital for the *Abkarry* business after *Matthew Abraham's* death; that he had removed the records of the distillery and had destroyed some since *June, 1853*; that he had destroyed all the records of the distillery up to *May, 1854*; and that he claimed the distillery as his own since *Matthew Abraham's* death, but did not produce any account of the business from that period. The Appellant, *Charlotte Abraham*, and the Appellant, *Daniel Vincent Abraham*, were examined as witnesses, and their evidence was in the main corroborative of the facts and circumstances above stated.

The documentary evidence adduced by the Respondent consisted of correspondence and other documents. The correspondence during the life of *Matthew Abraham* was relied on by the Respondent as showing that there was a general unity of interest between him and *Matthew Abraham*, and that such general unity was recognized by the family. Some of the letters contained among other matters the following expressions in allusion to the *Abkarry* contract:—"We have nothing else to depend upon," and "We shall have the benefit of it;" and again "We asked for the renewal of it;" and "We have a legal right to it."

The correspondence after the death of *Matthew*

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*Abraham*, consisted of letters from the deceased, *Charles Henry Abraham*, respecting his father's death and other matters, and from the Appellant the widow to the Respondent, with respect to the funds to meet the expenses of her son in *England* being supplied out of his father's estate. The Respondents also put in evidence a decree of the Auxiliary Court at *Guntoor* in a suit for maintenance; the translation of four awards of arbitrators upon divisions of ancestral property; a translation of a power of attorney in Persian signed by the Respondent and the Plaintiff, *Daniel Vincent Abraham*, authorizing a *Vakeel* to act for them in certain suits, in which was contained a recital that the Respondent and the third Plaintiff "are the heirs" of *Matthew Abraham*. *Daniel Vincent Abraham*, however, in reply to this stated in his examination, that he was about nineteen years of age when the above document was signed, and that he had but slight, if any, knowledge of the Persian language, and did not make himself acquainted with the contents of the document, but having full confidence in the Respondent, signed it. Various instruments dealing with the *Abkarry* and other property of the late *Matthew Abraham*, executed both before and after his death by the Respondent, together with the pleadings and decree in a suit instituted jointly by the late *Daniel Vincent Abraham*, the son, and the Respondent, respecting the affairs of his father, *Matthew Abraham*, and testimonials, contract bonds, &c., in relation to the *Abkarry* contract, showing the Respondent as holder of the *Abkarry* contract since the death of *Matthew Abraham*, were also put in evidence.

The Respondent's witnesses were examined, chiefly

with reference to the law by which native Christians were governed. Several of the witnesses who were East Indians, and considered themselves competent to give an opinion, gave it as their opinion that native Christians, were such Christians as were born in the country, and who have not changed their customs and habits, and that persons who, like *Matthew Abraham*, did not in any way differ from Englishmen, save in native origin, were to be classed with East Indians, and ought, like that class, to be subject to English law. Mr. *Ross*, one of the Respondent's witnesses, who had been well acquainted with the family, confirmed the fact of *Matthew Abraham* and the Respondent having been leading members of the East Indian community, and stated that none of the East Indians ever made any distinction between themselves and *Matthew Abraham* on account of his birth, and of the native dress he had once worn.

Mr. *Irvine*, the Civil Judge of *Bellary*, gave judgment in the suit on the 1st of June, 1858, and, as to the law of inheritance in respect of native Christians, rejected all the evidence of East Indians, as not being similarly situated with the *Abrahams*; but he considered that the documentary evidence of awards and deeds of division between native Christians and the evidence of the native Christians proved that the general state of native Christians was to remain divided, and that the undivided state was the exception. He held that the Respondent and his brother were not undivided in fact; that they were partners in the shop in equal shares; that the Respondent was the agent of his brother, and of the Plaintiffs after his death as to the *Abharry* contract, and also agent under the administration and power of attorney; and he decreed accounts to

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be taken in a certain manner, (a) with an allowance to the Respondent, and directing him to pay the costs.

From this decree the Respondent appealed to the *Sudder Dewanny Adawlut* at *Madras*.

When the appeal came before the *Sudder Court*, questions (b) were put to the Pundits of that Court, and answers to the following effect given: that property not ancestral, but acquired by all brothers jointly, by means of agriculture, trade, &c., was equally divisible among all of them: that the fact of the elder brother acquiring some property before the younger attained the age of discretion made no difference, especially where, during the latter years of the elder brother's life, the labour fell chiefly upon the younger; that under these circumstances the property should be divided into two shares, and one of them given to the sons of the elder brother and the other to the younger one; that the ignorance of the brothers of their respective rights in law would not affect such rights; and that the absence of intention on the part of the elder brother did not affect the rights of the younger.

The *Sudder Court* (consisting of Messrs. *H. Frere* and *L. T. Strange*), made their decree in the cause on the 5th of *November*, 1859, reversing the judgment of the Civil Court. This decree, in its main features, was to the following effect:—As to the law of inheritance, the *Sudder Court* considered that the Civil Judge, whilst deciding on the fact of division or undivision, had failed to pronounce any opinion upon the rule of law; the Court came to the conclusion that there was in *India* no *lex loci*, but that the rule of law must be according to the customs and usages of the class to

(a) See Order set out in the judgment, *post*, 233.

(b) See these questions stated in the judgment, *post*, p. 233.

which the parties belonged, and the usage in each particular family, to be ascertained by evidence. The Court founded its judgment on the report of the Indian law Commissioners, and the opinion of the Judges of the Supreme Court at *Calcutta*, that the English law was not in force in *India*, except so far as it was introduced by the Charters. The Court said that in seeking a law to apply to parties circumstanced as those in the suit, they were cast upon the rule laid down in section XVII., Reg. II. of 1802, that "in cases for which no specific rule may exist, the Judges are to act according to justice, and equity, and good conscience." That the *Sudder* Court, in a case similar to the present in regard to East Indians, who had no Code of law of their own, pointed out, under date the 14th of *July*, 1828, that the rule of law must be according to the customs and usages of the class to which the parties belonged, which was to be ascertained by evidence; and that on the 25th *January*, 1836, and the 3rd *September*, 1844, they gave effect to the same instructions. The Court agreed with the Civil Judge in rejecting the evidence of East Indians, but considered that the change of dress and manners could not alter the law of inheritance, or any local law or usage. The Court considered, that the evidence as to the usages in law of Christian converts from Hindooism was universal; that the Hindoo law as to rights in property, was the rule observed by the class in question, from generation to generation. The Court held that the acts of the family were in accordance with Hindoo law, referring to the suits in regard to the *Kurnaul* debts by Respondent and his nephew, as joint heirs of *Matthew Abraham*. In applying the Hindoo law, the Court adopted the opinion of the *Pundits*, considering that the dealings of the brothers

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brought them within that law, and held that, according to it, the Respondent was entitled to an equal share in the estate. The Court came also to the conclusion that the Respondent was not a salaried agent, or an agent at all, and that the evidence of the first Plaintiff and her relatives, the first two witnesses in this respect, was unworthy of credit, and that as the Plaintiffs were not justified in bringing the suit, the Court condemned them in all the costs that had been incurred.

The present appeal was from this decree.

The Solicitor-General (Sir *R. Palmer*), and Mr. *W. H. Melville*, for the Appellants.

This decree cannot be sustained. It is wrong in law in declaring that the rights of the parties, in this appeal are to be governed by the rules and principles of the Hindoo law. It is of the utmost importance to ascertain the *status* of persons in the position of *Matthew Abraham*, and the law by which the succession to their property is to be governed. In *India* the *status* of religion as regards natives is the *status* of law; the law is the religion both of Hindoos and Mahomedans. The Hindoo law, therefore, being a law of religion, cannot be applicable to persons who are not Hindoos, that are Christians, and as in this case, as well by descent, as profession, and whose ancestors for several generations have in every respect repudiated the tenets and principles of the Hindoo religion. Our contention is, that the law applicable in this case must be the law appertaining to that class of which the parties become members, or so much of it as is applicable to their peculiar situation. The English law of descent and succession, therefore, in the case of native East Indians, professing the Christian religion, must be the governing law in regard to the rights and possession of their property. This is apparent

as well from all sound and legal principles as from the laws enacted in *India*.

First, by *Mad. Reg.* II. of 1802, sec. XV. it is provided, that the Court shall proceed to try suits under the same rules and regulations as were prescribed for the trial of suits between individuals; and by section XVII. of the same Regulation it is enacted, that "in cases coming within the jurisdiction of the *Zillah* Courts, for which no specific rule may exist, the Judges are to act according to justice, and equity, and good conscience." Section XVI. cl. 1, of *Mad. Reg.* III. of 1802, further provides that in suits regarding succession, inheritance, marriage, and caste, &c., the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which the Judges are to form their decisions. *Mad. Reg.* V. of 1829, which was passed to modify the provisions of Reg. III. of 1802, as regarding the testamentary dispositions of Hindoos, recognizes the validity of Wills made by Hindoos, if made in conformity with the Hindoo law. Previous to the passing of the Act No. XXI. of 1850, the *lex loci* Act, in the case of apostacy, the change of religion on the part of a Hindoo deprived him of his right of inheritance, *W. H. Macnaghten's* "Hindu law," Vol. II. p. 131; but by that Act it is declared, that notwithstanding a Hindoo becomes a Christian, his rights of inheritance to property as a Hindoo shall not be thereby affected. But the Act, No. XXI. of 1850, never had or can have any application to this case. The *Abrahams* never were Hindoos in religion; they never professed or acknowledged the religious tenets upon which alone the Hindoo law is founded and by which it is governed. They were, therefore, not as Hindoos.

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within the pale of that law. The *Sudder Court* has held that there is no *lex loci* in *India*, and that the law to govern the case is to be sought in the usage of the class to which the deceased, *Matthew Abraham*, belonged. As to there being a *lex loci* or not in *India*, out of the jurisdiction of the Supreme Court Charters, the Report of the Indian Law Commissioners of *October 31st, 1840*, shows clearly, first, that the Commissioners considered that Hindoo law cannot apply to Christian converts; and, secondly, they thought that the English law must in such cases apply, but they seem to have given up that opinion in deference to the opinions of the Judges of the Supreme Court, who laid it down, that the English law was only introduced by Supreme Court Charters, and was co-extensive only with their jurisdiction. The doctrine that there is no *lex loci* in *India* is capable of a *reductio ad absurdum*. Persons who have ceased to be Hindoos have a law, or they have not. If they have not, no Court of Justice can adjudicate. If they have a law, it must be either the *lex loci*, or the law of usage. But a law of usage implies a continuance, and must have had a beginning; therefore, if there is no class similar to themselves, there can be no law of usage; and if there be a class, that class must for some time have been without a law. The *Sudder Court* has dealt with the case as one to be determined by usage of persons similarly situated with the deceased *Matthew Abraham*. The persons similarly situated are Christian converts from Hindooism, and the Judges of the *Sudder Court* have by their decree held that such native Christians are to be governed, as to their property, by the usage of Hindoo law, and that from the evidence in this case such usage is not inconsistent with the practice of the family. Now, both

Courts rejected the evidence of East Indians, persons of mixed 'European and native blood, whose evidence we insist' was strictly pertinent and ought to have been admitted. The class called "East Indians" are generally illegitimate children of a native woman, the father being European. But in such a case the application of Hindoo law depends upon the co-existence with the Hindoo *status*, and that is the Hindoo religion, *Myna Boyee v. Ootparam (a)*. The real question here is, what was the usage of this family? The evidence rejected shows that their usages were in every respect those of English East Indians. They conducted themselves as Englishmen in dress, habits, manners, and customs, and, moreover, held and conformed to the tenets of the Christian religion. Surely, this was evidence of their not being Hindoos; and if they were not Hindoos, then the Hindoo law of inheritance could not apply to them, for such law is part and parcel of the Hindoo religion, and cannot be separated from it. The whole evidence, which is very voluminous, proves most completely that there are four classes of persons belonging to the Christian community in India, namely, first, European Protestants; second, European Roman Catholics; third, East Indian Protestants, or Catholics, being either partially or wholly of native blood, and, as the family of the *Abrahams* are in this case, Christians by birth and parentage; and, lastly, there are native converts, either Protestants or Roman Catholics. Now, all these parties must have some *status* and some law to govern their rights, and if the Hindoo law is to apply to them, then they can have no rights of property whatever. This appears from an opinion of the Pundits, in a former suit, which was called for by the Appellants, and in which they stated that in

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(a) 8 Moore's Ind App. Cases, 400.

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the case of East Indians, "the law to be applied depended upon the religion which they professed.

But, secondly, there was "no ancestral property in this case, and, therefore, even if the Hindoo law could be shown to be applicable as between the parties, the consequences which the *Sudder Court* has deduced therefrom "would not follow, and the decree on that ground cannot be sustained. The facts are wholly opposed to the conclusion that *Matthew Abraham* and the Respondent were joint and undivided in estate, or that the Respondent had any interest in any part of the property in question, except that which belonged to him by contract, as the partner of *Matthew Abraham* under the deed of *April, 1832*; and the fact of *Matthew Abraham* having admitted the Respondent into partnership in the shop in 1832, under a deed of partnership, is conclusive against the claim which the Respondent now sets up to a general joint interest with *Matthew Abraham*, which, if it existed at all, must have existed prior to the partnership in 1832. Now, in all cases, within the application of the Hindoo law, where there has been property to start with, which property formed the nucleus of subsequently acquired property, though such is self-acquired property, yet the presumption in law is, that the whole property is in coparcenary, *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah (a)*. The very theory of an undivided family is founded upon the existence of paternal property. But our contention is, that *Matthew Abraham* and the Respondent did not constitute what the Hindoo law regards as an undivided family, and that the Respondent is not entitled to that special and peculiar right which the Hindoo law regards as attaching to the accretion

of property held in coparcenary. One way of testing the Respondent's claim is to consider whether a claim by him for a general partition during *Matthew Abraham's* life could have been maintained, which the authorities clearly show could not, *Strange's* "Hindu Law," Vol. I. pp. 195, 198-9, 203, 208, 213, 219, 221, 226-7; *Ib.* Vol. II., pp. 346, 357, 365, 370, 371, 375; *Inst. of Menu* (by *Haughten*), Ch. IX. sec. 204, p. 319; *W. H. Macnaghten's* "Hindu Law," pp. 43, 51. The *Mitaoshara*, ch. I. sec. 3. From the evidence in the cause it is apparent that this claim of the Respondent was an after thought. At the time of *Matthew Abraham's* death, as well as for some time after, he led the Appellants to believe that the *Abkarry* contract was held after *Matthew Abraham's* death precisely as it was before.

Then, lastly, we submit, that the *Sudder* Court was not justified in refusing an account, and that the decree proceeded on an erroneous basis in calculating the sums to be paid to the Respondent; and, under no circumstances, could the case warrant the imposition of the whole costs of the suit upon the Appellants.

Sir *Hugh Cairns*, Q. C., and Mr. *W. W. Mackeson*,  
for the Respondent.

There is no *lex loci* in *India*. Among Christian native Hindoo families, the rule of property and inheritance is regulated by usage among the class. According to the usage as proved in this case, the Hindoo law is followed by all classes of native Christians. As to the rule of law by which native Christians are regulated, that question is elaborately investigated in the Report of the Indian law Commissioners of the

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31st of *October*, 1840, and after a critical examination of all the decided cases, whether they related to Armenian, Portuguese, French, or native Christians in *India*, the conclusion arrived at by the Commissioners is, that the English law is confined within the limits of the Charters of Justice, and that there is no *lex loci* there, but that each class must be regulated by the customs and usage of the class, and each family thereof, and that this result must be arrived at in each case by evidence. In *Freeman v. Fairlie* (a), the Master reported, that the Supreme Court at *Calcutta*, created by the Statute, 21st *Geo.* III., c. 70, decided cases according to Hindoo or Mahomedan law, which could not be applied to the government of Christian people, and that there was no uniform *lex loci* to regulate inheritance, succession, &c. *Mad.* Reg. II. of 1802, secs. 3 and 4, applies to natives and other persons not British subjects; so *Mad.* Reg. VII. of 1827. It is true that *Ben.* Reg. IV. of 1793, section 15, applies only to Hindoos, or Mahomedans, but as the *Mofussil* Courts are Courts of conscience, they determine questions respecting the law of Foreigners, that is, not Hindoo or Mahomedans, but British subjects. Thus in *Durand v. Boilard* (b), the succession was governed by French law. *Joanna Fernandez v. Domingo de Silva* (c), was a case of Portuguese law, and the cases of *Avielick Ter Stafanoos v. Khaja Michael Arratoon* (d), *Humrus v. Humrus* (e), *Aratoon v. Aratoon* (f). *Gregory v. Cockrane* (g), related to Armenian Christians. So with

(a) 1 Moor's Ind. App. Cases, 324. (b) 5 Ben. Sud. Dew. Rep. 176.

(c) 2 Ben. Sud. Dew. Rep. 227. (d) 3 Ben. Sud. Dew. Rep. 9.

(e) 2 Borr. Bom. Rep. 496. (f) 7 Ben. Sud. Dew. Rep. 51.

(g) 8 Moore's Ind. App. Cases, 275.

Parcees, *Mihirwanjee Nuoshirwanjee v. Awan Bacc (a)*, *Modree Kaikhooscrow Hormusjee v. Cooverbhacc (b)*; likewise Sheikh law, *Doe d. Kissenchunder Shaw v. Baidam Beebee (c)*; also among members of the Shieeah sect of Mahomedans, *Rajah Deedar Hossein v. Ranees Zuhoor-oon-Nissa (d)*, and by the English law, *Hoo v. Peter Marquis (e)*. This view of the law, that the *Mofussil* Courts adjudicate according to the law of parties not being Hindoos or Mahomedans, is strengthened by the Act of the Indian Legislature, No. XXI. of 1850, by which it is declared that, notwithstanding a Hindoo becomes a Christian, his rights of inheritance or property as a Hindoo shall not be thereby affected. We insist that with respect to the customs and usages applicable to native Christians, the evidence here clearly establishes that the law of their ancestors, namely, the Hindoo law, was the only guide; that birth and blood must decide, and the adoption of English dress and manners does not and cannot alter the rule of law or change the *status* of the parties as to the acquisition and transmission of property.

Secondly, according to Hindoo law, the Respondent was entitled to an equal share with his brother, and, after his death, with his family, in all the property, which was joint property. The Hindoo law applicable to the joint acquisition of property by two brothers, although not undivided, is clear, *Koshul Chukurwutty v. Radhanath Chukurwutty (f)*, *F. Macnaghten's "Hindoo Law,"* pp. 45, 66; *Strange's "Hindu Law,"* Vol. I. p. 213, and cases collected in

(a) 2 Borr. Rep. 209.

(b) 6 Moore's Ind. App. Cases, 448.

(c) 2 Morley Dig., 22.

(d) 2 Moore's Ind. App. Cases, 441.

(e) 4 Ben. Sud. Dew. Rep. 243. (f) 1 Ben. Sud. Dew. Rep. 335.

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*Morley's Dig.* tit. "Partition," Vol. I, 480. The legal result is, that the brothers had an equal interest in the joint acquisitions, even although, ignorant of the law, and admitting, no intention of creating a joint interest existed. As to the joint acquisition of property by the Respondent and his brother, *Matthew*, by their joint labour, we submit that the evidence is sufficient, independently of Hindoo law, to create a joint and equal interest between the brothers. This is shown by the confidential and unreserved mode of dealing between them, their living together, their joint purchases and mortgages, and the constant and invariable course, of joint and common interest for twelve years succeeding the death of *Matthew*, without account or claim.

Then with respect to the accounts. If the interest of the brothers is held to be joint, which we insist it was, then Rs, 3,00,000 is to be taken as a basis of calculation, and the amount received by the Appellants added to it, and then the total of the two amounts should form the valuation of the joint property, and this is the mode of taking the account which was finally agreed to by the several parties before the *Sudder* Court. This proposal was made to avoid the expense and delay of taking accounts generally, and the Court acted upon it, and we contend that, assuming the interest is held to be joint, both parties are bound to have the account settled on that footing, and have thereby waived general accounts.

Lastly, in case of there being no joint interest, the Respondent is entitled, to the whole of the *Abkarry* contract, and the profits thereof, from the 20th of April, 1843, as his exclusive property, he being ready

in such case to allow a fair sum for the distillery, plant, and premises.

Their Lordships' judgment was postponed, and was now delivered by

The Right Hon. Lord KINGSDOWN.

The Appellants in this case are *Charlotte Abraham*, the widow, and *Daniel Vincent Abraham*, the only surviving child of *Matthew Abraham*. The Respondent, *Francis Abraham*, was the only brother of the late *Matthew Abraham*. *Matthew Abraham* and the Respondent were by birth Hindoos of pure native blood, being descended from a family of Hindoos. Their ancestors for several generations had embraced Christianity, and they were themselves Christians, originally it appears Roman Catholics, afterwards Protestant Dissenters, and subsequently members of the Church of England. They were of the class known in *India* as "native Christians." *Matthew Abraham* was by far the elder of the two brothers; for in early life, when the Respondent was only about two or three years old, he was employed as a clerk in the arsenal at *Bellary*. In the year 1820, he married the Appellant, *Charlotte Abraham*. This lady and her father and mother were also Christians; the father an Englishman and the mother a Portuguese. They were of the class known in *India* as East Indians. There was issue of this marriage the Appellant, *Daniel Vincent Abraham*, and another son, *Charles Henry Abraham*, who survived his father, *Matthew Abraham*, but died pending the proceedings brought before us by this appeal. In the year 1823, *Matthew Abraham*, established a shop at *Bellary*, the business of which was continued to be carried on up to the

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time of his decease. Throughout these proceedings it is called the shop-business. In the year 1827, *Matthew Abraham* entered into a contract with Government for the supply of liquors to the troops at *Bellary*, and erected a distillery for the purposes of this contract. The contract was renewable annually, and was annually renewed to *Matthew Abraham* up to the time of his decease, except in one year when it fell into other hands. Throughout these proceedings it is called the *Abkarry* contract. In the year 1832, *Matthew Abraham* took Mr. *Richardson* and the Respondent, his brother, into partnership with him in the shop-business, each party taking a third of the profits. This partnership was dissolved in the year 1837, and the business was thenceforth, until the death of *Matthew Abraham*, continued by him and the Respondent, his brother, without any new arrangement having been come to between them. The Respondent, some time before the death of *Matthew Abraham*, also married a Christian lady of the class known as "East Indians." In the year 1842, *Matthew Abraham* died, leaving the Appellants and *Charles Henry Abraham*, his widow and children. After his death the Respondent continued to carry on the shop-business, and he also procured the *Abkarry* contract to be annually renewed in his name, and carried on the business of that contract, and the distillery connected with it. In the year 1854, the Appellants and *Charles Henry Abraham* instituted against the Respondent the suit out of which this appeal has arisen, estimating the property to be recovered in the suit at Rs. 3,00,000.

By their plaint in the suit they alleged, that the whole of the capital in the shop-business was supplied

by the late *Matthew Abraham*; that the distillery business was carried on by him alone and with his own capital, and that the Respondent was his clerk, agent, or manager, in this business at a salary; that on the death of *Matthew Abraham*, the duty of collecting his estate devolved on the Appellant, *Charlotte Abraham*, and she intrusted the collection, realization, and management of it to the Respondent, and gave him a power of attorney for that purpose, and that the Respondent had carried on both the shop-business and the distillery business by means of the late *Matthew Abraham's* capital; that he had made payments to and on account of the Plaintiffs, and for the debts of *Matthew Abraham*, but not nearly to the amount which he had received: and the plaintiffs accordingly by their plaint, prayed for an account of the late *Matthew Abraham's* estate received by the Respondent, including the profits of the shop-business and of the distillery, subsequently to his decease, offering to make the Respondent a just and sufficient allowance for his services in managing the distillery business since the death of *Matthew Abraham*.

The Respondent, by his answer to the plaint, insisted, that the Appellant, *Charlotte Abraham*, being the widow of the late *Matthew Abraham*, could not claim jointly with her sons, the other Plaintiffs; that she was entitled only to maintenance, and must seek it from her sons. He said that *Matthew Abraham's* situation in the arsenal was procured for him by his father; that the father demised when he, the Defendant, was about two or three years of age, and that the late *Matthew Abraham* took charge of him, the Defendant, as his guardian, and took charge also of all the property left by their father; that the shop-

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business had been conducted by him both in the lifetime and since the decease of *Matthew Abraham*, but that as the deceased *Matthew Abraham* and he (the Defendant) were possessed of very little property, they had jointly borrowed money at interest on their joint bonds to carry on their business, and that it was by these means the capital of the business had been raised; and he urged that the late *Matthew Abraham* and he (the Defendant) were brothers of an undivided native Hindoo family, jointly, labouring together for their common welfare, borrowing money on interest for their business upon their joint bonds and security, and mortgaging all their joint property of every description as security for the same; and consequently that the late *Matthew Abraham* and he (the Defendant) had an equal right to all the capital, and not the elder brother, *Matthew Abraham*, alone. He said that the Plaintiffs, *Charles Henry Abraham* and *Daniel Vincent Abraham*, were merely junior members of an undivided Hindoo family, and that he (the Defendant) by the death of *Matthew Abraham* had become the head of the family, and he insisted that the fact of himself and his father and family being Christians could not and did not make them subject to the English law. That their religion was an accident, and that in fact, they were Hindoos and undivided, and must of necessity, and according to all practice and precedent, be subject to the Hindoo law and no other. He denied that the *Abkarry* contract was the property of *Matthew Abraham* alone, and alleged that he (the Defendant) had purchased the contract after the death of the late *Matthew Abraham* on his own responsibility.

The Plaintiffs by their replication submitted, that

By whatever law the case was to be decided, they had all a common interest against the Defendant, and that no final decision could be come to in the absence of any of them. They relied upon the family having been Christians for several generations as putting an end to the Defendant's assertion that the case ought to be decided according to the Hindoo law; and after referring to the class of East Indians having always been considered to be governed by the same laws as Englishmen as to their rights of descent and inheritance, and to authorities by which, as they contended, it was shown that in suits between parties who were neither Hindoos nor Mahomedans in religion, the usages of the particular class to which they belonged formed the guide of the Court, and that even in cases to which Hindoo law was applicable, the usages of the family were to be the rule of guidance when they were opposed to the law, they submitted that the Court, before coming to a decision in the case, ought to consult the usages of the class to which the parties in the suit belonged, and ascertain what had been the usages of the family in which they had been reared. They further insisted, that even if the case was to be governed by the Hindoo law, the Defendant had no right to any portion of the late *Matthew Abraham's* estate. They denied that *Matthew Abraham* inherited any property whatever from his father and said that the father died an insolvent and ruined man, and that *Matthew Abraham* had taken charge of the Defendant and reared him from generosity, and had begun the affairs under litigation when the Defendant was a boy at school, and unable to assist him in them. They insisted that *Matthew Abraham* and the Defendant were not members of an undivided family in the

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light alleged by the Defendant, and that even if *Matthew Abraham* obtained his original appointment under Government through the instrumentality of his father, it would confer no right on a younger brother, but the salary attached to the appointment would, even under the Hindoo law, be considered a separate acquisition.

The Defendant, by his rejoinder, adopted the view insisted upon by the replication as to the principles which ought to determine the law by which the case should be decided, submitting that the Plaintiffs had laid down the correct principle, namely, that the customs and usages of the class to which both parties belonged must be sought for and searched, and, further, that the usages of the particular family to which the parties belonged must be looked to, in order to ascertain what law was to govern their relations to each other.

It appears from the record of proceedings before us that in this stage of the suit the Plaintiffs were non-suited by a decree of the Civil Court of *Bellary* upon the grounds, first, that the Plaintiff, *Charlotte Abraham*, the widow, could not take part in the suit, she having no right of inheritance as the family stood: and secondly, that no sufficient description or specification of the value of the property sued for had been given in the plaint; but upon an appeal to the *Sudder Adawlut*, this nonsuit was set aside, and the Civil Judge was directed to dispose of the case on the merits, the Court observing, that the Civil Judge had pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties were to be bound, without receiving any evidence whereby to govern his judgment on the

subject, and, that such a judgment could only be rightly pronounced upon a consideration of the usages of personal situated as the parties were, being Christians whose ancestors were of Hindoo stock, and of the usages in their particular family, as indicated by the acts of the parties and their predecessors in respect of their property since they had belonged to the Christian community, and that it would be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine whether it was the estate of the deceased, *Matthew Abraham*, acquired by himself, or of ancestral origin, after which the rights of the parties thereto, whether under the English or Hindoo law, should be declared.

The case was accordingly remitted to the Civil Court of *Bellary*, and the points stated in the pleadings (a) were recorded for proof. A vast mass of evidence upon the points recorded was adduced, both on the part of the Plaintiffs and on the part of the Defendant. Their Lordships do not find it necessary to enter into the details of this evidence. It will be sufficient for them, in disposing of the several points of the case, to state the conclusions at which they have arrived as to the result of the evidence bearing on these points.

By the decree made upon the hearing of the cause by the Civil Court of *Bellary*, the Court ordered as follows:—That an account be taken of the capital employed in the shop-business and of the profits thereof, both prior and subsequent to *Matthew Abraham's* death, and that the

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(a) *Ante*, p. 207.



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Defendant do pay to the Plaintiffs one-half of the capital and profits found due. That an account be taken of the capital employed in the distillery business and of the profits, down to the time of the death of *Matthew Abraham*, and also of the profits of the distillery business, arisen since his death, and that the Defendant do pay to the plaintiffs the amount of the capital and profits found due. That an account be taken of all other the moneys, goods, debts and property of *Matthew Abraham* which have been collected or received by, or come into the possession of the Defendant, or any person by his order or for his use, and that the Defendant do deliver up to the Plaintiffs all such portions thereof as consist in kind or specie, and do pay to the Plaintiffs all such portions thereof as consist of money, and do pay such portions thereof as have been converted into money since the death of *Matthew Abraham*. That so long as the present contract endures, and so long as the Defendant carries on the business in the Plaintiffs' distillery buildings, &c., and with their capital, stock, &c., he must and shall be considered as their agent, and as such accountable to them for all the profits arising from the said business, and that he shall deliver up to the Plaintiffs all deeds, books, securities, documents, papers, and writings in his possession or power, relating to the said contract or to the said distillery business, or otherwise relating to the property, estate, or effects of *Matthew Abraham*, deceased the Plaintiffs being bound, in taking the aforesaid several accounts, to make to the Defendant a just and sufficient allowance for his services in managing the said distillery business, and also for his services in collecting and managing all other the property, estate,

and effects of *Matthew Abraham*, and that the Defendant do pay to the Plaintiffs the costs of the suit.

From this decree the Defendant appealed to the *Sudder Court*.

The *Sudder Court*, upon the case being brought before it, submitted a question to their Pundits in these terms:—"Two brothers, governed by Hindoo law, inherit no ancestral property. They live together. The elder acquires some property. The younger brother, as he comes to years of discretion, is subsequently admitted by the elder to take part in the administration of his business. They jointly borrow money for the uses of the business, and both give their labour thereto. The elder of those brothers has demised. During the latter years of the deceased brother the labour fell chiefly on the younger one. Since the demise it has fallen exclusively on him. The elder brother has left two sons. Are the said uncle and nephews to be considered co-sharers: and, if so, in what proportions?"

And the Court afterwards submitted this further question to the same Pundits:—"Supposing the said two brothers and the sons of the deceased brother to be ignorant of their respecting rights in law over the said property, would this interfere with the title of one party or the other to recover such right when disputes and consequent litigation occurred between them?"

The opinion given by the Pundits upon these questions having been, that the property ought to be divided into two shares, and one of them given to the sons of the elder brother and the other to the younger one, and that the rights acquired by the sons

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could not be affected by their ignorance of those rights, the Court as to the legal rights of the parties held that they stood as representing two branches of a family governed, as to rights in property, by Hindoo law, and with equal shares; and having arrived at this conclusion, the Court adopted the estimate of the value of the property made by the Plaintiffs for the purposes of their suit—that it was of the value of Rs. 3,00,000, added to that amount the sums which had been paid to the Plaintiffs and to creditors, and the value of some part of the property in the Plaintiffs' possession, thus bringing up the entire value of the property to Rs. 4,71,114. 10s. 5p., and taking one-half of that amount as the Plaintiffs' share, and deducting from it the sums which had been paid to them, and one-half of the debts, found the balance due to the Plaintiffs to be the sum of Rs. 71,492 10s. 9½p., which the Court ordered the Defendant to pay to the Plaintiffs in discharge of all obligations due by him up to the date of the suit, The Court was also of opinion that the Plaintiffs were not justified in having recourse to the suit, and accordingly imposed upon them all the costs which had been incurred by it.

It is from this decree of the *Sudder* Court that the present appeal has been brought.

The first and most important question raised by this appeal is, by what law the rights of these parties ought to be determined. In considering this question it is material in the first place to observe what was the real point in issue in the cause. Laying out of consideration the objection raised by the answer, that the Plaintiff, *Charlotte Abraham*, as widow, could not sue jointly with the other Plaintiffs, her sons, an

objection of misjoinder of parties which, in their Lordships' opinion, was properly answered by the replication, and properly disposed of by the *Sudder* Court when the case was first brought before it by appeal, the true question at issue in this case is, not who was the heir of the late *Matthew Abraham*, but whether he and the Respondent formed an undivided family in the sense which those words bear in the Hindoo law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parcenership, and not of heirship. Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject; but parcenership, understood in the sense in which their Lordships, here use the term, as expressing the rights and obligations growing out of the *status* of an undivided family, is the creature of, and must be governed by, the Hindoo law. Considering the case, then, with reference to parcenership, what is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindoo law recognizes and creates. Their Lordships, therefore, are of opinion, that upon the conversion of a Hindoo to Christianity the Hindoo law ceases to have any

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continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion.

It appears, indeed, both from the pleadings and from the points before referred to, that neither side contended for the continuing obligatory force of Hindoo law on a convert to Christianity from that persuasion. The custom and usages of families are alone appealed to, with a reference also to the usages of this particular family; a reference which implies that the general custom of a class is not imperatively obligatory on new converts to Christianity. The conclusion at which their Lordships have arrived on this point, appears also to be supported by authority; for the opinion expressed as to the Hindoo law by the Judge of the Civil Court at *Bellary* seems to coincide entirely with the opinions of Pundits reported in *W. H. Macnaghten's "Hindoo Law,"* Vol. II. pp. 131-2. It is there stated, that on the death of an apbstate from the Hindoo faith, his heirs, according to Hindoo law, will take all the property which he had at the time of his conversion; and the marginal note states, that his subsequently acquired property would be governed as to its devolution by the law of his new religion. The religion embraced in that case was the Mahomedan, which regulated the devolution of property. The Pundits, therefore, in their reply, naturally connected religion was the rules of descent of property as an adjunct, but the important point, which they declare is the separation of the convert from the binding force of Hindoo law, as to his subsequent acquisitions.

Such, then, being the state of the case, so far as the Hindoo law is concerned, we must next consider whether there is any other law which determines the rights over the property of a Hindoo becoming a convert to Christianity. The *lex loci* Act clearly does not apply, the parties having ceased to be Hindoo in religion; and looking to the Regulations, their Lordships think that so far as they prescribe that the Hindoo law shall be applied to Hindoos and the Mahomedan law to Mahomedans, they must be understood to refer to Hindoos and Mahomedans not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the Regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindoo law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by

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attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed.

Their Lordships have thought it right thus to state their opinion on this point, as this is the first case in which the question has been brought under their consideration. They consider the decision referred to in the judgment of the *Sudder Dewanny Adawlut* in the case of a succession to one of the class of East Indians to be an instance of a just and proper exercise of the discretion entrusted to these Courts. The English law, as such, is not the law of those Courts. They have, properly speaking, no obligatory law of the *forum*, as the Supreme Courts had. The East Indians could not claim the English law as of right; but they were a class most nearly resembling the English, they conformed to them in religion, manners, and customs, and the English law as to the succession of movables was applied by the Courts in the *Mofussil* to the succession of the property of this class.

Such, then, being their Lordships' opinion as to the law by which they ought to be guided in the decision of this case, it becomes necessary to see how the case stands upon the evidence.

Their Lordships collect from the evidence that the class known in *India* as "native Christians," using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate

divisions forming again distinct classes, of which some adhere to the Hindoo customs and usages as to property; others retain those customs and usages in a modified form; and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property.

Of this latter class are the "East Indians," a class well defined in *India*, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law, which the British subjects, in the limited sense of the terms of the jurisdiction of the Charters of the Supreme Courts, enjoy, in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects.

Reverting again to the evidence, their Lordships think that it is to be collected from it that the family from which both the late *Matthew Abraham* and the Respondent descended was of that class of native Christians which commonly retains native usages and customs, and they consider it probable, therefore, that had the family possessed property they would, so long as those usages and customs were retained, have enjoyed it in common according to Hindoo custom; but their Lordships are perfectly satisfied upon the evidence that the late *Matthew Abraham* and the Respondent had no ancestral property, and that the property which the late *Matthew Abraham* had was acquired by him by his own sole unaided exertions, and without any use whatever of any common stock. They fully concur in the finding of both the Courts in *India* upon this point. They are also quite satisfied upon the evidence that

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from the time of the late *Matthew Abraham's* marriage he and [be] Appellant, *Charlotte*, his wife, and their children adhered in all respects to the religion, manners, and habits of the East Indians, the class to which the Appellant, *Charlotte Abraham* belonged.

Previously to the marriage some doubt appears to have been entertained whether the East Indians, the class to which the lady belonged, would receive *Matthew Abraham* into their society and treat him as one of themselves. The evidence on this point of the Appellant, *Charlotte Abraham*, the first Plaintiff, is corroborated by that of a very respectable witness, on whose veracity no doubt can rest. Before this time Mr. *Matthew Abraham* had assumed the English dress, and had outwardly conformed to all the habits of the English. Assurances were given that the East Indians of *Bellary* would recognize her husband as one of their body, and the marriage took place. On one important public occasion when a jury was summoned of East Indians, *Matthew* sat as one of them, and acted as their foreman.

The evidence on this part of the case appears to their Lordships to be clear beyond all doubt. They proceed, then, to consider its effect. That it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, their Lordships entertain no doubt; but that is not the question on which this case depends. The question is, whether, when there are different laws as to property applying to different classes, parties ought not be considered to have adopted the law as to property, whether in respect of succession *ab intestato* or in other respects, of the class to which they

belong. In this particular case the question is, whether the property was bound by the Hindoo law of partnership.

Now, *Matthew Abraham* acquired the nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown, as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no rule as to such use and enjoyment, which the ancestors may voluntarily have imposed on themselves, could be of compulsory obligation on a descendant of theirs acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, *à fortiori* a Christian may do the same. Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. It was well observed by Mr. *Melville*, that custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable; as dependent on the changeful inclinations, feelings, and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fiction juris* as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience or

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interest? Surely, in things indifferent in themselves, the Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of domicile. The *argumentum ab inconvenienti* cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should it be regarded as non-existing in law? Their Lordships are of opinion, that it was competent to *Matthew Abraham*, though himself both by origin and actually in his youth a "Native Christian," following the Hindoo laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged. This was no light and inconsiderate step, taken up on a whim, and to be as lightly laid aside. We find in the evidence that there was on one side an exhibition of preliminary caution. The change was deliberate, it was publicly acted upon, and endured through his life for twenty years or more. His family was managed and lived in all respects like an East Indian family. In such a family the undivided family union in the sense before-mentioned is unknown. How, then, can it be imposed on that family of which *Matthew Abraham* formed the head as

father? Not by consent, for there was none; not by force of obligatory law, for there was none; not by adoption, for they had not adopted any Hindoo customs, but, on the contrary, had rejected them all. It could only be imposed, as it seems to their Lordships, by passing over the actual family springing from the marriage, and by absorbing all its members in the original family of which the two brothers were members; by passing over all actual usages, customs, and ways of living; and by supposing, contrary to fact, the prevalence of Hindoo customs which had been deliberately abandoned. Their Lordships, therefore, are of opinion, that the undivided family on which the Defendant relies in his answer did not exist in any sense which is material to or assists the decision of the case.

There being then, in their Lordships' opinion, no such undivided family, and the case not being, in their judgment, governed by the Hindoo law, it is unnecessary to discuss the opinion given by the Pundits upon the operation of that law, or to enter into the question, so much discussed at the Bar, whether the late *Matthew Abraham's* acquisitions ought, or ought not, according to that law, to have been deemed to be his separate estate. It is sufficient, with reference to the opinion of the Pundits, to say, that the case stated for their opinion proceeds upon an assumption which, in their Lordships' judgment, was not warranted by the facts. Their Lordships, however, think it right to add, for the guidance of the Courts in *India* in future cases, that whenever the opinion of Pundits is required, and there are any special circumstances which may bear upon the question to be submitted for their opinion, those

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special circumstances ought to be set forth in the case submitted to them. Their Lordships make this observation with reference to the broad and general statements contained in the case which, in this instance, was laid before the Pundits: "that the brothers lived together, and that the eldest acquired some property," unaccompanied as those statements were by any specification of the mode in which, and the circumstances under which, the brothers so lived, and the property was so acquired—circumstances which, to say the least, were important to be considered in forming an opinion upon the point submitted for consideration.

Having thus considered the case so far as respects the law to be applied in determining it, their Lordships will now proceed to consider how the case stands upon the evidence with reference to the point whether the Defendant was entitled to share in the property in question by agreement, or consent amounting to agreement, between him and the late *Matthew Abraham*; a point which, though not distinctly pleaded on the part of the Respondent, must, as their Lordships think, upon a fair view of all the pleadings in the case, be considered to be open.

In considering the weight of the evidence upon this point, the first thing to be determined is, upon whom does the burthen of proof rest? Their Lordships are of opinion, that it lies on the Defendant. It must be so, even under the Hindoo law, as the nucleus of acquired property was in this case separate, unaided acquisition, unaided either by funds or labour of the claimant. Their Lordships do not propose to enter into a minute examination and consideration in detail of every part of the evidence relied upon, nor

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of every observation made and argument urged upon it by either side : that course would extend their observations to an unnecessary and unprofitable length. They propose to deal with the presumptions insisted on, on either side, as arising from the conduct of the parties, and to contrast and weigh those presumptions. The case was rightly stated by Mr. *Mackeson* to be, not a one-sided one ; on the contrary, it presents evidence embarrassing to deal with, both in the conflict of positive testimony and of opposing presumptions. For the Appellants, the presumptions from conduct principally relied on are those which arise from what appears upon the evidence as to the following matters ; first, the habits of life of the families both of *Matthew Abraham* and the Respondent, as inconsistent with the nature of the existence of an undivided Hindoos family, Hindoos by origin, but not Hindoos by religion. Secondly, the establishment by *Matthew Abraham* of a business under his sole name ; his introduction into it of his brother and *Richardson* as partners with himself ; his formal public notification of that fact to the world by a notice stating that he had introduced them into his firm ; the payment of rent for the shop, both during the continuance of that firm and by the succeeding firm, which then consisted of himself and his brother only ; and the inconsistency of that payment with the joint property in the building and premises. Thirdly, the signatures on several occasions of *Francis Abraham* as agent ; his dissatisfaction with the business at *Kurnoul* ; and his language regarding it as inconsistent with a joint ownership and corresponding voice. Fourthly, after the death of *Matthew Abraham*, the inconsistency of the Defendant's whole con-

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duct for a time, with any notion in his mind that he had a joint legal interest in the whole property of the family. Much stress was laid on the inconsistency of the statement in the Respondent's letter to *Charles Henry Abraham*, of the 19th of August, 1842, in which, giving an account of all the property of *Matthew Abraham*, he states that, it was in the bracketed item or items alone he had a half share, the item or items so bracketed not including the distillery, which is afterwards mentioned as a part of the property of *Matthew Abraham*; on the Respondent's fears expressed in the same letter of being left to seek his fortune; on his expression that he had hoped that his brother would have provided for him; and on the request to *Charles Henry Abraham*, to intercede with his mother to carry out the presumed intentions of his father. Fifthly, the treatment by the Defendant of Mrs. *Charlotte Abraham*, as the head of the family; the inconsistency of that treatment with her condition of a widow in a family adopting or retaining Hindoo customs and law in part and by choice; the administration taken out in her name; and his taking a power of attorney from her. These were treated as inconsistent with the Respondent's position in the family on his hypothesis.

On the other side, the nature of the original family to which the Defendant and his brother belonged; the customs of the Christian class within which that family was included; and the ordinary enjoyment of their property by such families according to the customs of their Hindoo progenitors, were relied on to show that the family dealt with the property as an undivided one.

The dealings of the Defendant in the management

of his brother's affairs; the absence of any satisfactory proof that he had received any salary or emolument as agent or clerk; the consistency of all that he did with the ordinary course of dealing in an undivided Hindoo family; the presumed continuance of a state proved to have existed, and not in terms proved to have been interrupted; the execution of the bonds and conveyances referred to in the Respondent's case; and the inconsistency of those instruments with the ordinary dealing of a mere clerk or agent,—were pressed with much force on the attention of their Lordships. The statement of ownership in *Francis Abraham* contained in his mortgage deed, and the admissions derived from the acts of the third Plaintiff, *Daniel Vincent Abraham*, in the suits and proceedings relating to the *Kurnoul* affairs, also referred to in the case of the Respondents, were urged as additional grounds in support of the case of the Defendant, which it was argued the language of a large portion of the correspondence strengthened.

Their Lordships will first consider the evidence on these points, and the presumptions to be drawn from it with reference to the Hindoo law. In this point of view much, if not the whole, of what is urged on the part of the Respondent as to the nature of the original family to which he and *Matthew Abraham* belonged, and as to the dealings of such families, is sufficiently answered by what has been already said as to the right of *Matthew Abraham* to change, and as to the fact of his having changed, the class of Christians to which he was attached. As to the absence of proof that the Respondent received any salary or emolument as agent or clerk, independently of the absence and destruction of books and accounts, which cannot

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but weigh heavily against the Respondent, it is to be observed that there is an equal absence of proof that the Respondent ever received any share of profits as parcener.

The arguments from the dealings of the brothers, so forcibly urged by Sir *Hugh Cairns*, are certainly as forcibly to prove an ordinary partnership as to prove that kind of parcenary which obtains under the Hindoo law. These brothers, when they established a partnership in the shop, established and maintained it on the ordinary commercial basis, in shares, as well when they were the only partners as when *Richardson* was associated with them. On what ground, then, should a Court conclude, if it thought that a conjoint interest existed in the *Abkarry* contracts, that it was founded on Hindoo family union, rather than on the model of the shop business? This presumption could only be made by assuming the Hindoo law to govern the case.

As to the bonds and conveyances, it is to be observed, that these instruments are wholly unexplained by the evidence, and that the fact of the Appellant, *Charlotte Abraham*, having been made a party to some or one of them, renders it very difficult to deduce from any of them the inference for which the Respondent has contended; but, what is, perhaps, of still greater importance is this, that there is no proof of the application of any of the moneys raised by these instruments to any other purposes than the purposes of the shop, and that the Respondent by his answer refers to these moneys having been raised for the purposes of the shop business. With respect to the correspondence, their Lordships feel no doubt as to the conclusion to be drawn from it. After care-

fully perusing it, they have been unable to find anything at variance with the statement contained in the letter of the 19th of *August*, 1842, to which they have above referred. They find much, both in the correspondence and in the other documents, in proof in the cause which tends to confirm what is stated in that letter.

The Respondent, by that letter insists on no right. He merely suggests a similar remuneration to that which he had hoped to receive by way of testamentary gift from his deceased brother. Their Lordships are totally unable to reconcile this letter with the existence of the right since insisted on. After giving due weight to the arguments on both sides on its construction and meaning, they are unable to adopt that reading of it on which the Counsel for the Respondent have insisted. That construction is not, in their opinion, consistent with either the spirit of the composition, viewed as a whole, or with its language.

Then as to the admission contended to have been made by the Appellant, *Daniel Vincent Abraham*. Neither the Appellant, *Charlotte Abraham*, nor the late Plaintiff, *Charles Henry Abraham*, is in any way proved to have been privy to, or cognizant of, this admission; the late Plaintiff, *Charles Henry Abraham*, was absent in *England* at the time, and he never in any way adopted it. It is, no doubt, evidence against all the Plaintiffs, but, in their Lordships' opinion, undue weight has been ascribed to it in the judgment of the *Sudder Court*. Whence had this young man of nineteen his knowledge that the family was undivided? It is a mixed and complex proposition of fact and law; and it supposes a *status* concerning which the Respondent himself seems to have been

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long uncertain. Had he so understood his position at the time when he wrote the letter of the 19th of August, 1842; had he then considered that he was a half sharer in the whole property, he could scarcely have expressed himself as he did in that letter. Yet to this admission of a youth, ignorant alike of law and business, a binding effect is given against all the Plaintiffs on the record.

Their Lordships are not prepared to follow the *Sudder* Court in the weight which they have given to this admission. Looking at the whole case, with reference to the Hindoo law, they are of opinion, that the claim of the Respondent to a share of the property in dispute by virtue of that law cannot be supported, and they are not less satisfied that if the case be looked at with reference to the English law—a point of view, however, which, so far as the Respondent is concerned, seems to them to be excluded by the pleadings in the cause—the evidence on the part of the Respondent is insufficient, when weighed against the evidence on the other side, to establish a partnership according to that law. Their Lordships, therefore, have come to the conclusion, that the decree of the *Sudder* Court cannot be maintained; but, on the other hand, they are not prepared to go to the full length to which the Judge of the Civil Court of *Bellary* has gone by his decree. The Respondent no doubt stood in a fiduciary position; though he may have been unconscious of the duty arising from his acts, he had, in effect, attorned to the Appellant, *Charlotte Abraham*, by accepting a power of attorney from her. That character, and the acquisitions under it, should have been renounced before the Respondent asserted an interest adverse to that of his constituent; such

an assertion in one acting as agent is not prohibited on grounds of policy alone. It is in itself an unconscientious breach of duty to a principal. The Letters of administration were, indeed, taken out for a special object only, they were not strictly necessary, a certificate would have sufficed. But they were not of a limited character. There were assets in the local jurisdiction, and all parties concerned in interest were either consenting to, or subsequently ratified, the authority delegated by the Letters of administration. The administration related back to the death of *Matthew Abraham*; the possession of the whole property, therefore, from the time of his death must be ascribed to the first Plaintiff, as the Defendant acting under his power could not claim adversely.

Their Lordships are by no means disposed to infringe upon the wise and salutary rules which have been laid down as to the conduct of persons standing in confidential positions; but, on the other hand, they entirely agree with the *Sudder Dewanny Adawlut* in their estimate of the value of the Respondent's services. The property in the *Abkarry* contract may, by reason of its special character, be said to have been in a great degree preserved to the family by him. The evidence shows that none of the Plaintiffs were competent to the management of the concern. In all probability, but for the Respondent, the contract would have been lost to the family. It is represented to have been the chief source of their income. It differs materially from an ordinary trading partnership. The selection of the contractor is influenced by considerations which might probably have caused the Respondent to be named as the successor to his brother in the contract. The relation-ship of the

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Respondent to the family, the devotion of his time and labour to the augmentation of its wealth, the creation, as it were, of the profits of the *Abkarry* business, establish a great difference between this and the case of any ordinary agency.

In ordinary cases and under ordinary circumstances these services on the part of the Respondent would, no doubt, be sufficiently compensated by the provision in that behalf contained in the decree of the Civil Court, but in this case their Lordships find it proved by the Plaintiff's first witness, that the Respondent on *Matthew Abraham's* death declared to him that he had worked like a slave in the *Abkarry* business, and was merely paid for his labour; but that for the future he would not do so unless he received an equal share with the others, meaning his brother's widow and two sons; and the witness says that he soon afterwards mentioned this conversation to the widow. If the widow dissented from this view, she ought, as their Lordships think, to have communicated such dissent to the Respondent, but she never did so. After her having so long availed herself of the Respondent's services, which she knew to be rendered on the faith of his receiving one-half the profits as a remuneration for those services, she and the other parties interested in the estate could not, in their Lordships' opinion, be justly entitled to dispute the right of the Respondent to be remunerated to that extent. Their Lordships, therefore, think, that it ought to have been declared by the decree that the Respondent was entitled to an equal share of the profits of the *Abkarry* contract accrued after the death of *Matthew Abraham* as a remuneration for his services in the execution of that contract. Their Lordships

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think also that, having regard to the evidence to which they have last alluded, and to the Respondent having been permitted for so many years to carry on the *Akharry* contracts without any dissent having been expressed to the terms stipulated for by him, the decree of the Civil Court has not dealt properly with the question of costs. They are of opinion that, under the circumstances of the case, the costs, up to the hearing, ought not to have been given against the Respondent by the decree, but ought to have been reserved until the accounts were taken. The benefit which may result to the estate may form a material ingredient in considering what ought ultimately to be done as to the costs, and the mode in which the Respondent may account under the decree may also influence that question. The decree of the Civil Court having thus, in their Lordships' opinion, gone too far, their Lordships think that there should be no costs of the appeal to the *Sudder* Court or of this appeal.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the *Sudder* Court, and to restore the decree of the Civil Court of *Bellary*, modified as above pointed out (a).

(a) See Varden, Seth Sam v. Luckpathy Royjee Lallah, *post*, 303.

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JUGGOMOHUN GHOSE

... *Appellant*,

AND

KAISREECHUND... .. \* ... *Respondent.\***On appeal from the Supreme Court at Calcutta.*

30th June,  
&  
1st July,  
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Neither by the English nor the Hindoo law, unless there be mercantile usage, can interest be imported into a contract, which contains no stipulation to that effect.

In an action on contract, known as *Tajee munde* *Chit'iespium* wager contracts, (before the passing of the Act, No. XXI., of 1848, which prohibited such gambling contracts,) the Plaintiff claimed interest on the sum recovered. Held, that as there was no stipulation as to interest in the contract, or satisfactory evidence of mercantile usages at Calcutta to import interest into the contract, the interest claimed could not be allowed.

THIS was an appeal from a judgment of the Supreme Court at *Calcutta*, founded on a verdict of that Court, sitting as a jury, on a new trial had in pursuance of a remit by the Judicial Committee, in an action on promises brought by the Appellant against the Respondent and one *Manickchund*, since deceased.

The only question on the new trial and urged in this appeal, was whether upon the evidence the Appellant had established any usage of trade at *Calcutta* so as to entitle him to interest on the principal sum of Rs. 7,150. 6s. 3p., awarded to him on the new trial. The nature and circumstances of the case are fully set forth in the report of the former appeal (a).

In pursuance of the Order in Council made by Her

(a) 7 Moore's Ind. App. Cases, 263.

\* Present : Members of the *Judicial Committee*,— The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

*Assessors*,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

Majesty on the hearing of the previous appeal, the Appellant set the cause down for a new trial on the former pleadings, and the action was tried on the 1st and 4th of June, 1860, before the Chief Justice, Sir Barnes Peacock, and Sir Mordaunt Wells, in the Supreme Court at Calcutta.

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The Appellant, upon the question of mercantile or trade usage, examined eight witnesses, and put in two depositions of witnesses, taken in another action. The effect of their evidence was to show that no such general usage as that insisted on by the Appellant existed; that in cases in which interest was paid between the parties to such opium *chittees*, it was not by force of the original contract, or the usage of the trade, but under a distinct and substantive agreement, made sometimes in writing and sometimes verbally, between the original parties after the *chittees* became due and a failure to pay accordingly on the part of the then debtors; and that such new agreement gave further time for the payment of the principal, varying from four or five to twenty days, and providing for the payment of interest at rates varying according to the arrangement of the parties in each separate transaction. The Respondent examined three witnesses, and put in also the deposition of another witness taken in the other action. These witnesses deposed, that there was no known usage of trade, such as that which had been contended for by the Appellant, and agreed with the witnesses of the Appellant, so far as they declared that wherever interest was paid, it was not under the *Tasee Mundee Chittees*, but under a subsequent fresh arrangement made by the parties in respect to the payment of such interest.

Upon this evidence a verdict was given by the



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Supreme Court for the Appellant, for the principal sum of Rs. 7,150. 6a. 3p. only, as on the former trial, without interest.

The Chief Justice, on delivering the verdict, said,—  
 "It appears to the Court that the Plaintiff is not entitled to interest on the principal sum admitted in this case to be due in respect of differences on the opium sales in question; and if the case had not come down to us from the Privy Council for a new trial on this point, we should have been disposed to stop the case, concurring with the Counsel for the Defendant, that the Plaintiff has given no sufficient evidence in support of his claim to interest; but in consequence of Sir *John Coleridge's* remark in the judgment of the Privy Council (7 Moore's Ind. App. Cases, 282), to the effect that the evidence on the former trial required explanation, we thought it better that the case should proceed, and that the evidence which was forthcoming on the Defendant's part should be gone into, in order that if our decision should again go to the Privy Council, the case might be free from the former objections. Several questions have been raised in argument. The learned Advocate General in his reply contended that, as this was a case between Hindoos, we were bound to decide this question of interest according to the rules of Hindoo law, without reference to local usage, and that by that law interest was given in many cases, such as on money or goods lent, in which it was not generally recoverable by the law of *England*. It was not shown that according to Hindoo law interest would be payable under such a contract as this, in which there is no stipulation for interest, and I am not sure that in cases where interest is payable,

according to the Hindoo law, it can be recovered merely as damages. If it is recoverable as due by contract, the declaration should be framed accordingly, and the interest should not be claimed merely as damages. I understand that by the Hindoo law, when interest is payable, it is so expressed in the contract, and is due as a right, and that there is no such distinction as in our law of interest being given as damages for breach of contract. Something was said by the Advocate-General as a reason for not claiming interest in terms, with reference to this contract being considered as an immoral one; but in that case not only interest but the principal also would be irrecoverable, and we cannot say that this contract is so far illegal as to avoid the claim to interest without avoiding also the right to the principal. The cases, however, already decided in the Privy Council between Hindoos, affirm that these contracts are not void either by English or Hindoo law (see *Doolubdass Pettamberdass v. Ramloll Thakoorseydass*, 5 Moore's Ind. App. Cases, 109, and cases there cited); and, therefore, if the principal sum would be legally recoverable, it would follow that the interest, if due, might also be recovered. There is, however, no authority cited to satisfy the Court that such a contract bears interest, and there is nothing on the face of the plaint in this action claiming interest or charging the Defendant with a liability to pay it. The plaint, in substance, only states that the contract was not performed and thereby the Plaintiff sustained damage. Is the Court then bound to allow interest, or has it the option here, as in other cases, of giving or withholding it?

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According to the English law, unless there is some usage of trade, such a demand would not bear interest, and there is no case which shows that according to Hindoo law a different rule applies. We are, therefore, driven to ascertain whether such a usage of trade exists, as that it must be supposed that the parties contracted with reference to it. We are not at all sure that, if such usage was made out, the Court would not be bound to give interest, not as damages, but as a substantial part of what was due by the contract as itself. In *Calton v. Bragg* (15 East, 223), the action was for a balance consisting solely of interest, the principal having been paid. It was there decided, that interest was not allowable by law upon money lent generally without a contract expressed, or to be implied from the usage of trade, or other special circumstances. But there, if the action could have been supported, it would have been for interest as part of the debt, and not as damages. In an action on a Bill of Exchange, where interest is not expressed on the face of the Bill, interest is recoverable merely as damages, but if the Bill contains a stipulation for interest it becomes a part of the debt. It has been laid down that an invariable custom of trade affecting a contract is to be presumed as incorporated into the contract as in view of the contracting parties at the time. If, therefore, this contract had stated that the Defendants would pay the opium differences within three days after the sales, and in case of default would pay interest, the stipulation for interest would be such an integral part of the contract as that the Court would be bound to give it as part of the debt. But it is not so sought to be recovered, but as damages

merely. Suppose, instead of an express, there were an implied contract to pay interest from the course of dealing between certain parties, as in the case of tradesmen's bills in this city, which often specify in the heading that interest will be charged at a certain rate if the bill is not paid within a given time ; if parties go on dealing with notice of these terms, a jury might infer that the customer agreed to the stipulation to pay interest if he delayed to pay the debt. In such case the interest would be recoverable as due by contract, and not merely as damages for the nonpayment of the demand. Now, the general usage of trade, where established, operates in the same manner as a particular course of dealing between individuals. If, then, there be a well-known usage of trade in reference to particular contracts, a person dealing in the trade, contracts on the terms of the usage ; if interest is here recoverable on the difference of the opium sales by virtue of general usage, it is due by contract and not simply as damages. But, whether this is so or not, is comparatively immaterial, for the Court is of opinion, that no such usage of trade has been proved by the evidence. In only one instance, the case of one *Neem Mullick*, it was said that on a contract similar to the present, interest was paid. In all other instances we find that the payment was made by the *Shroffs* on behalf of the parties at the time when it became due. There was one witness, *Manickjee Rustomjee*, who said that he paid interest on such contracts. But the way in which he paid interest was this, it was not on particular *Chittees*, but he had got a *Shroff* to issue these *Chittees* for him ; the *Shroff* paid the losses at

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due date, and he advised *Manickjee* of the payments, and debited him with the payments and interest in a general account current between the parties. This, therefore, was a payment of interest not under the opium *Chittees*, but upon money advanced by the *Shroff* to pay the opium *Chittees*, and interest was charged in the usual course of dealing between the parties. In all the other cases of *Chittees* not being paid when falling due, all the witnesses agree, that the holder would call on the party liable, and if he were unable to pay, there would be a fresh arrangement (sometimes in writing, at other times verbal) giving a certain number of days, varying from four or five to twenty, for payment with interest at various rates. In such cases interest became chargeable by virtue of the new and special arrangement; and this is a strong argument against its being considered by the parties to be due as part of the original contract; for if interest were due according to the term of the original contract, there would be no necessity for a new agreement stipulating for interest. In all these instances, the arrangement was for a short period, of some twenty days at the utmost; and there is no case like the present, when the claimant has lain by for ten years, and then claimed interest. It was paid by some of the witnesses that the original contracts did not provide for interest in case of default in payment, because the contractors would be considered dishonourable if they contemplated such a contingency as failure to pay; and in fact, as suggested by Mr. Justice *Wells*, these new contracts for enlarging the time of payment appear to have been made for the purpose of preventing the exposure of the defaulters

in the market, and the consequent injury to their credit. It appears to the Court, therefore, that there has been no usage of trade established by the evidence from which they can infer that, when the parties dealt it was an implied term of their contract, that in case of default in payment, interest would be chargeable without any further agreement; and there will, therefore, be a verdict for the Plaintiff for the principal sum which is admitted to be due, viz., Rs. 7,150. 6a. 3p.. but without interest."

The present appeal was brought from this verdict.

Sir *Fitz-Roy Kelly*, Q. C., and Mr. *W. Paterson*,  
for the Appellant.

This action was brought by the Appellant upon certain contracts, known in *India* as "*Tajee Munde Chittees*," respecting the average price of opium at the first public sale by the East India Company for the year 1846, and the Appellant sought to recover the difference between such average price and the prices mentioned in the *Chittees*. Upon the former appeal here, *Juggomohun Ghose v. Manickchund* (a) a new trial was ordered on the ground that the evidence of mercantile usage, given by the Appellant at the trial, as to allowance of interest upon these *Chittees*, required to be answered. On the new trial there was ample evidence of usage to pay interest when default was made in paying the principal on *Tajee Munde Chittes*, and the Respondent failed to answer it by any satisfactory evidence to the contrary. The verdict of the Supreme Court, sitting as a jury, in not giving interest, as damages, we insist was against the weight of the evidence, and cannot be sustained. Again, it is most

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important to bear in mind that the finding of the Supreme Court at *Calcutta* is in direct conflict with the decisions of the Supreme Court at *Bombay* and of this Tribunal. In the case of *Ramlal Thakursidas v. Dulabdas Pitamber (a)* it was held, that such wagers by the mercantile usage at *Bombay* carried interest, and Lord *Wensleydale*, in pronouncing the opinion of their Lordships in the same case upon appeal, *Doolubdass Petamberdass v. Ramloll Thackoorseydass (d)*, says, "As to interest, we think the Court below were warranted in giving it, for it appears that interest was accustomed to be paid on such pecuniary transactions." In the cases of *Rughoonauth Sahoi Chotayloll v. Manickchund (c)* and *Rughoonauth Sahoi Chotayloll v. Uggerchund (d)* from *Calcutta*, interest was not claimed, and the question, therefore, did not arise. Here the Supreme Court at *Calcutta*, when applied to, refused to allow interest as damages. Now, we submit, that would not be creditable to the administration of justice in *India* to have conflicting judgments upon the same transaction, although they arose in different parts of the same country, and we contend, that the judgments in the *Bombay* cases in allowing interest were right. The Chief Justice too was wrong in stating that interest should be claimed by the declaration. It is not necessary expressly to plead such a demand. In the case of Bills of Exchange and Promissory notes, interest is recovered as damages.

Mr. *Forsyth*, Q. C., and Mr. *Leith*, for the Respondent.

This Court, when the case was formerly before it, did not decide that interest could be claimed by the

(a) *Perry's Oriental Cases*, p. 198 (b) 5 *Moore's Ind App. Cases*, 136-  
 (c) 6 *Moore's Ind. App. Cases*, 251. (d) *Id.* 262.

law of *India* as now insisted by the Appellant, or determine that the mercantile usage upon this point at *Calcutta* was the same as that at *Bombay*. All this Court did on that occasion, was to remit the case to the Court below, to enable the Appellant to establish his claim to interest by showing that in *Calcutta* mercantile usage to allow interest in transactions of this nature existed. Interest is now claimed first, as part of the *lex fori*, and, secondly, as a custom of trade so well understood as to be within the intention of the parties and impliedly, therefore, incorporated into the contract. But the requisites to support such a claim are, that it be invariable, clearly defined, and the terms fixed. Now, was such a custom established by evidence in this case? Because it must be borne in mind that the *onus* of proving the usage of trade, relied on by the Appellant as entitling him to interest, lay on him, and we submit, that he failed to prove such usage. The idea of the claim for interest upon these *Chitties* never occurred to the Appellant until the decision in *Doolubdass Petamberdass v. Ramlohl Thackoorseydass* was pronounced by this Tribunal. The declaration did not contain any count for interest. The argument of the Appellant, that if the judgment of the Court below stands, there will be a conflict of decisions between the Courts at *Bombay* and *Calcutta*, and that it is desirous to have uniformity of decisions, is fallacious. In the first place, these wager contracts have been declared illegal by the Act of the Indian Legislature, No. XXI. of 1848, and, secondly, the case really does not involve a point of law to be decided as the rule in future cases. It is simply a question of fact of mercantile usage and trade, and, amounts to no more

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than this: Has the Appellant, by his evidence given in this action proved to the satisfaction of the Court that the custom contended for by the Appellant exists? Our contention is, that he has failed to do so. There is nothing extraordinary that the course of trade and usage as to allowance of interest at *Bombay* should differ from that at *Calcutta*. It occurs in this country. Take for example, the custom of Bankers in *Scotland* and of Bankers in *England*.

Their Lordships stopped the Respondent's Counsel, and called upon

Sir *Fitz-Roy Kelly*, who was heard in reply.

At the conclusion of which their Lordships' judgment was pronounced by

The Right Hon. Lord KINGSDOWN:

Their Lordships are of opinion, that the judgment of the Court below was perfectly correct and ought to be affirmed.

When this case was before their Lordships on the former appeal, they thought the right to interest must depend on this point, whether there was, or was not, a mercantile usage sufficiently clear to enable the Court to import that condition into a contract which had been made between the parties. Their Lordships were of opinion, that on the former trial that fact had not been sufficiently investigated. There was evidence which required an answer, and that answer had not been given. Their Lordships, therefore, thought it necessary to send it back to *India* to a second trial.

Evidence upon the point of mercantile usage at *Calcutta* to allow interest on these *Chittees* has now been obtained, and their Lordships are clearly of

opinion, 'that the Court below was quite right in holding that it does not sufficiently establish the usage, upon which alone the right to interest must depend.

In ~~the~~ *Bombay* case, what their Lordships decided was this ; that as there was evidence there given which the Court below thought was sufficient to establish the custom, and as their Lordships were not prepared to dissent from that conclusion, they held that the Court below was warranted in giving interest ; and it might well be that such a custom prevails in *Bombay* and does not prevail in *Calcutta*.

This case was sent back for the express purpose of trying whether in *Calcutta* such a custom or usage did prevail there. If it did prevail, there should have been evidence of an overwhelming character to establish it. Such evidence has not been given ; and their Lordships are clearly of opinion, that the Court below could come to no other conclusion than that it did not prevail.

The judgment, therefore, was perfectly right, and the appeal must be dismissed, with costs.

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                     BAHADOOR                      ... }

AND

BABOO HURRUCK NARAIN SINGH } *Respondents.\**  
                     and others                      ... }

*On appeal from the Sudder Dewanny Adawlut at Calcutta.*

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Sale for arrears of Government revenue set aside.

The sale advertisement being irregular, first, in not being published in conformity with sec. 6, of Act No. I. of 1845; and secondly, the *Mehals* not being sold in their consecutive numbers, in the *Towjee* or Register of the Collector of the District, as provided by section 14, of that Act.

Such an irregularity is not cured by Act, No. IX. of 1854, which relates only to technical errors of procedure in the Lower Court, which are not productive of injury to either parties.

IN this appeal the suit was instituted to set aside a sale of an ancestral estate sold under the provisions of Act, No. I. of 1845, for arrears of Government revenue, and to obtain possession, with mesne profits and interest.

The estate, called *Talooka Sarungpore*, was put up to public auction, and sold by the Government Collector under Act, No. I. of 1845 by reason of the default of the Respondents in not paying the arrears of Government revenue due thereon. At such sale the late *Maharajah Roodur Singh*, the father of the Appellant, became the purchaser for the price of Rs. 1,02,100; and he was put into possession by the Government officers.

\*Present: Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

*Assessors*.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

He remained in possession up to the time of his decease, when the Appellant, as heir-at-law, succeeded to the same. The chief ground upon which the sale was sought to be set aside was certain alleged informalities and irregularities in the conduct of the sale charged against the Government Collector with reference to the provisions of the above Act.

The facts of the case were as follow :—

The *Talooka Sarungpore*, a permanently settled estate, was the ancestral property of the Respondents; and the *kists* or instalments of Government revenue payable by them thereon, for the months of *Chey*t and *Bysack* 1255, *Fuslee* era, corresponding with the year 1848 A.D., were allowed to fall into arrear, and amounted to the sum of Rs. 1,573. 11a. 6p. The instalment payable for the month of *Chey*t became due on the first of the next following month, and the instalment payable for *Bysack* became due on the first of the next month, viz., *Fey*t, and not having been then paid, were at these respective dates treated as being in arrear, according to the provisions of section 2 of Act, No. I. 1845. In pursuance of the requirements of section 3 of that Act, a general notification, fixing the latest date for the liquidation of arrears, was published in the Courts of the District and every *Sudder* and *Mofussil* office, and under the same notification the latest date for the liquidation of the arrears was the 7th of *June*, 1848, but at that date the arrears were not paid.

It is provided by section 3 of the Act, No. I. of 1845, that on such default the estate in arrear shall be sold at public auction to the highest bidder. On the 9th *June*, 1848, a proceeding was held by the Government Collector, in which it was declared and

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recorded that the estate was liable to be sold. In accordance with that proceeding, and in pursuance of the provisions of section 6 of the above Act, a notification in the native language was issued by the Collector on the same date, intimating that the 5th of *July* following was the day fixed for the sale of the estate. Also, in pursuance of section 7 of the same Act, a proclamation was issued by the Collector on the same day, directed to the *Ryots* and under-tenants upon the estate, forbidding them to pay rent to the defaulting proprietors from the day after that fixed as the last day for liquidating the said arrear as aforesaid. Two advertisements in the English language were also published, one in the *Agra* Government Gazette, and another in the *Bengal* Government Gazette, notifying that the *Talook*, with others also mentioned, would be sold on the 5th of *July*, 1848, for the recovery of balances of Government revenue not paid up on the 7th of *June*, 1848.

Petitions were presented by the defaulters praying that the Collector would exempt, in his discretion, under section 11 of that Act, the estate from sale by receiving the balance due, but the Collector held that he had no power to accede to the application.

On the 5th of *July*, the day notified, the estate was put up to public auction, and sold by the Collector to the late *Maharajah Roodur Singh*, at the highest bidder, for the sum of Rs. 1,02,100.

The defaulters presented a petition to the revenue Commissioner against the sale, under section 17 of the Act, No. 1. of 1845, containing their grounds of appeal, in which they set forth certain alleged irregularities or informalities in the notification of the sale, and in the conduct of the sale on the part of the Collector,

and prayed an annulment of the sale. These alleged irregularities were stated to be, first, that as by section 14 of the Act, No. I. of 1845, it was clearly laid down that a day was to be fixed for the sale (agreeably to the provisions of section 6 of that Act), it was necessary to hold the sale on that day ; and secondly, that the sale was to be consecutive, according to the order of the number ; namely, that the *Mehal* which bore the smallest number on the *Towjee*, or register of the Collector, was to be first brought to sale ; that in like manner, it was necessary to hold the sale of the remaining *Mehals* in the same succession and order ; and that it was not in the power of the Collector, or any other of the officers, to bring any *Mehal* to sale by a breach of number. That from a perusal of the advertisement contained in the Gazette, it was apparent, that *Mouzah Bishenpoor Bulabhudder*, the number of which on the register *Towjee* is No. 696, was inserted in the first number ; *Mouzah Luchmeepoor*, the register *Towjee* number of which is No. 652, was inserted in the second number ; *Talooka Sarungpoor*, the number of which is No. 3047, was inserted as the third number ; and *Mouzah Mutrapoor*, the register number of which is 3,482, was inserted as the fourth number in the proclamation, and that the sale was so accordingly held ; whereas, if the first number had been entered as the second number, and the second number as the first number in the sale proclamation, there would have been no breach of numbers. That by this means, the conclusion of the sale, contrary to section 14 of that Act, was clearly established. That a greater informality in the sale existed,—the advertise-

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ment prescribed by section 6, of the same Act, fixing the 5th of *July*, 1848, as the day of sale, and forwarded to the printing-office for the information of the auction-purchasers, agreeably to the authority of the Circular letter of the *Sudder Board*, No. 11, dated 20th *June*, 1845, and according to which, being printed, it was transmitted, by means of the Government Gazette, to all the civil and revenue authorities in every *Zillah*, being manifestly erroneous, as it appeared from the heading of the advertisement to be inserted in this form:—"First, that in accordance with section 6, Act I. of 1845, the *Mouzahs*, mentioned below, would assuredly be sold in the office of the Collector of the District of *Tirhoot*, dated 5th *July*. 1848, corresponding with the 19th *Assar*, *Fuslee* (on Wednesday), for the recovery of the balances due to Government from the *Mehals* mentioned below, at the request of the Collector of the District of *Bhagulpore*"; whereas in the *Talooka* in dispute there was no government arrear demanded by the Collector of the District of *Bhagulpore*. Second, in the detail of the advertisement, as in the place of *Pergunnah Suressa*, both in English and Persian, *Talooka Sarungpoor*, *Pergunnah Suressa*, was inserted. That *Pergunnah Suressa* was not in the District of *Tirhoot*. That this error was contrary to section 6, Act No. I. of 1845, and the Circular letter of the *Sudder Board*, No. 11, dated 20th *June* of that year, therefore, in consequence of the occurrence of such irregularities, the sale could not be affirmed, as in the event of the affirmation of the sale, according to the notification, the purchasers would be entitled to the possession of the *Mehal*, the arrears of which might be demanded by the Collector of the District of

*Bhagulpore*, and that *Mehal* be attached to *Pergunnah Sarum*, and not, according to law, of *Talooka Sarungpoor*, *Pergunnah Suressa*.

The Commissioner, after referring the matter to the Collector, refused the prayer of the petition, and on the 10th of *August*, 1848, affirmed the sale. The *Sudder Board of Revenue*, when applied to, refused to interfere in the matter.

In consequence thereof, several of the defaulters commenced the suit out of which the present appeal arose, by filing their plaint in the Court of the Principal *Sudder Ameen of Tirhoot*, against the Government, the Collector of the District, and the late *Maharajah Roodur Singh*, the auction purchaser, as principal Defendants, and also against certain other parties, described as precautionary Defendants, in conformity, as alleged, with the provisions of sec. 19, of Act, No. I. of 1845, within the term of one year from the date when the sale became final and conclusive. The plaint, among other things, stated, that the suit was brought to recover possession of, and for the insertion of the Plaintiffs' names in respect to, *Talooka Sarungpoor*, *Pergunnah Suressa*, by the annulment of the sale held on the 5th of *July*, 1848, and the annulment of the proceeding of the Commissioner of Revenue, dated 10th of *August* of the same year, affirming the sale; as well as to obtain the sum of Rs. 13,735 3a., the principal and interest and the mesne profits from the date of the sale. The plaint then stated the principal facts contained in the Plaintiffs' petitions filed in the Revenue Courts aforesaid, both before and after the sale, and that, as those Authorities would not annul the sale, the Plaintiffs had brought their suit for that purpose, on the

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grounds of certain irregularities, the principal of which were, that the notifications or advertisements were informal and erroneous according to section 6 of the Act; that the sale was made in opposition to the provisions of sec 14 of the Act, inasmuch as the *Mehal* was alleged to have been out of the order prescribed by that section, and not with reference to its number on the *Towjee*, or Register of the Collector, with reference to the numbers of the other *Mehals*; and that it was put up for sale, and sold earlier in the sale than another *Mehal* bearing a lower number on the *Towjee* of the Collector, and sold at the same sale. The plaint then stated the reason why the parties called precautionary Defendants were made Defendants, namely, that they were the proprietors of certain *Mousahs* included in the *Talooka*, and would not join the Plaintiffs in bringing the suit, alleging them to be colluding with the other Defendants, and prayed that they might be put in possession of their estates, and have their names recorded in the column of proprietors, by the removal of the name of the auction-purchaser, with mesne profits and interest, to the day of the recovery of possession.

The answer of the Government, amongst other things, submitted to the Court the irregularity of making both the Government and Collector parties to the suit, and insisted on the validity of the sale, with reference both to the notifications and proclamations in regard to the provisions of the Act, No. I. of 1845, and the Circular Order of the *Sudder Board*, dated 18th April, 1843, and the form appended thereto.

The answer of the Appellant, as the son and heir of the late *Maharajah Roodur Singh*, who had died

pending the suit, after stating several irregularities in the suit, apparent on the face of the plaint, and submitting that the suit should be dismissed, met the several statements in the plaint by denying the alleged collusion, and upholding the sale to *Maharajah Roodur Singh*, as purchaser at the public sale by auction, as regular and valid. The other Defendants also put in answers.

The hearing of the suit took place before the Principal *Sudder Ameen* (Mr. *E. Dacostas*), on the 7th of *April*, 1853, when he gave judgment and decreed in favour of the Defendants, dismissing the suit with costs. After deciding that there was no ground for a non-suit, he proceeded in these terms:—"I now proceed to the merits of the case. It appears that this sale was held under Act, No. I. 1845, on the 5th of the month of *July*, 1848, for a balance of Rs. 1,573. 11a. 6p, and was confirmed by the Revenue Commissioner on the 10th of the month of *August*, 1848, by the dismissal of the Plaintiffs' appeal against the sale. The claimants now come into Court, not denying the fact of being in arrear, but seeking to obtain a reversal of the sale, on pleas of which the following is the substance:—First, that under section 11 of the aforesaid Act, the Collector did not exempt their estate from sale, though he did those of several other defaulters, by receiving their rents subsequently to the last date of payment. Second, that their ancestors' good services to the State have not been taken into consideration. Third, that the payment of the arrears was withheld by the Bankers, in collusion with the *Maharajah*, the Defendant. Fourth, that the price realized at the sale was inadequate. Fifth, that the Commissioner's order confirming the sale is

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opposed to sections 11 and 18 of the aforesaid Act. Sixth, that the sale was held contrary to the provisions of sections 6 and 14 of that Act, out of its turn—or, in other words, out of the regular order of the number of the *Towjee*—and without publication of the notice in the 'Gazette.' Now, it is obvious, that all the foregoing pleas, except the last, or sixth one, are absurd and irrelevant, no ways affecting the legality of the sale. By section 24, a revenue sale can only be set aside by the Civil Court, upon the ground of its having been made contrary to the provisions of the Act above mentioned. The fact of the Collector not exempting the Plaintiffs' estate from sale under section 11, and of the Commissioner of Revenue not suspending his final orders on their appeal against the sale, and not representing the case to the *Sudder* Board of Revenue under section 18, are no infractions of the law. Both these sections vest the Revenue authorities with a discretionary power to grant the favour, but it is clear that, in the present instance, they did not feel justified or warranted in granting the indulgence. Indeed, the Collector, in his letter to the Revenue Commissioner, under date the 22nd *June*, 1848, plainly states, that no sufficient reason that I can discover exists to enable me, under section 11, Act, No. I. 1845, to exempt this estate from sale. On the score of indulgence alone can the boon be granted.' And, notwithstanding that the Plaintiffs did prefer an appeal to the Commissioner against the sale, yet that Authority, seeing no reason to annul the sale, rejected their petition. As regards the sixth or last plea urged by the Plaintiffs, I do not find that the provisions of sections 6 and 14 have been anyways infringed. The records of the

case clearly show that the notice of sale prescribed by the first-mentioned section has not been duly and regularly issued, but published both in the English and vernacular Government Gazettes, and that the sale has been conducted in strict conformity to the last-mentioned section. *Mouzah Luchmeepoor*, bearing No. 652 of the rent-toll or Register; *Talooka Sarungpoor*, the validity of which is contested by this suit, No. 3047; and *Mouzah Mutrapoor*, No. 3482; forming class first *Mehals*, have been very properly and correctly classed in regular order, and sold accordingly in the rotation of their numbers in the manner advertised in the *Calcutta Gazette* of the 21st June, 1848, viz., the lower numbers on the Register preceding the higher ones. Consequently, *Mouzah Bishenpoor Bullabhudder*; *Chuckla Gurjoul*, *Pergunnah Bisarah*; bearing No. 696 of the rent-toll on Register, being of a different species, appertaining to class four of the form annexed to the Circular Order of the *Sudder Board*, dated the 18th of April, 1845, No. 9, of the *Agra Gazette*, could not, of course, be intermixed with class first, estates, and classed or sold second. To do so would only be to reverse the regular series of the number of each class of *Mehals*, prescribed, not only by the said form, but by the rules of section 14. The entries made in the advertisements issued under section 6 correspond with those published in the *Calcutta Gazette*. The discrepancy in the *Agra Gazette* is satisfactorily explained by the Collector. It is evidently an error of the printer, and arises from the circumstance of his having (to save the space of the separate notice) placed under an erroneous heading, estates, class one below class four *Mehal*. This, however affords no

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ground for invalidating the sale. In the advertisements printed in the *Calcutta Gazette*, and those sent to the Courts and other places, under section 6, no error exists. In short, there are no grounds set aside the sale, which has been conducted in strict conformity with the provisions of Act, No. I. of 1845, and is in every respect good and valid ;" and it was accordingly ordered, that the plaint be dismissed.

Two appeals were brought from this decree, which were afterwards consolidated. The hearing of the same took place on the 29th of *August*, 1856, before Messrs. *Trevor, Samuels, and Money*, the Judges of the *Sudder Dewanny Adawlut* at *Calcutta*, when the Court recorded their opinion, that the only pleas to be considered were —“ First, that the sale advertisements in the *Agra* and *Calcutta Gazettes* disagreed with each other, and were not published in strict conformity with section 6, Act, No. I. of 1845 ; and, secondly, that the *Mehals* were not sold in their order in the *Towjee*, in consecutive numbers, agreeably to the provisions of section 14 of the Act above cited. The Appellants state that the *Mehals* were published in the following order in the *Agra Gazette* :—‘ First, *Bishenpoor Bullabhudder*, No. 696. Second, *Luchmeepoor, Pergunnah Dhurour*, No. 652. Third, *Sarungpoor, Pergunnah Saram*, No. 3047.’ Whereas No. 652, should have been first, and No. 696, second. That the Collector admits the incorrectness of this advertisement, but explains that the *Mehals* were sold according to the *Calcutta Gazette*, which was correctly printed and published. That in the *Calcutta Gazette* they stand thus :—‘ First, *Luchmeepoor*, No. 652 ; second, *Sarungpoor*, No. 3047 ; third, *Muttrapoor*, No. 3482 ; fourth, *Bishenpoor Bullabhudder*, No. 696.’ Whereas No. 696, which is fourth, should

have been advertised and sold before No. 3047, which is second in the notification. The Defendants contend, that the Plaintiffs have misconstrued the intent of section 3, Act, No. I. of 1845, which relates to *Mehals* permanently settled; and of section 5, which has reference to various *Mehals* settled for fixed periods; and also of the Board's Circular Order of the 18th of April, 1845, and the form appended to it. The *Mehals* of various kinds were advertised in the Government Gazette, in conformity with the above form. That the sale of the estate in question was conducted regularly, with due regard to its consecutive number, according to the provisions of the Act; the three first estates being of the same description—that is, *Mehals* permanently settled and sold for the realisation of arrears of revenue due from themselves, and the fourth estate being sold for arrears on account of other *Mehals*; and, lastly, that the estate No. 696, was placed fourth in the *Agra* Gazette through the mistake of the printer, which would not invalidate the sale, inasmuch as section 6 of the Act does not provide that the notifications enjoined by the Act shall be printed with reference to the consecutive numbers of the *Mehals* in the Gazette; and section 14, which enjoins that sales shall be made with reference to the consecutive numbers of the estates to be sold, duly provides that they shall be sold with reference to their consecutive numbers in the *Towjee*; and the sale was duly conducted under the provisions of this section." The Court then finally pronounced their decree as follows:—"Upon the first plea we find no difficulty. The alleged disagreement between the *Agra* and *Calcutta* Gazettes appears upon the record, and is admitted by

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the Collector. It is evident, from a comparison of the notification published in the two Gazettes, that the variance complained of existed ; but we are of opinion, that this disagreement between them does not in any way vitiate the subsequent sale, and is no ground for us, under the provisions of section 6, or any other section, of the sale Act, to pronounce the sale of the estate to be invalid. It is necessary, under the law, that there should be a sufficient publication of the estates that are to be sold ; but the Act nowhere enjoins that the estates shall be sold in the order specified in those notifications. We proceed, then, to consider the second plea, regarding the sale of the estates in their regular order or sequence according to the consecutive numbers on the *Towjee*. The order in which sales are to take place, is distinctly laid down in section 14 of the Act—'It is hereby enacted that, on the day of the sale fixed, sales shall proceed in regular order, the estate to be sold bearing the lowest number on the *Towjee* or registers in use in the Collector's Office of the District being put up first, and so on in regular sequence ; and it shall not be lawful for the Collector to put up any estate out of its regular order by number.' We find that the estates notified in the *Calcutta* Gazette were sold in the order in which they are placed in that notification—*Talooka Sarungpoor*, the estate in dispute, bearing the number 3047 in the *Towjee*, was sold before the 2-anna share of *Mousah Bishenpoor*, the number of which was 696 on the *Towjee*. The Pleaders for the Defendants contend that these estates were sold in their order, according to their respective classes or descriptions, as laid down at the end of section 5 of the Act, and that, therefore, they were sold according to their

consecutive number in the *Towjee*, and in accordance with the provisions of section 14. The defence set up by the Collector in the Lower Court is to the same effect. In interpreting the meaning of the provisions of this section, we must look at the precise words, and construe them in their literal and ordinary sense. It is only where the meaning of the law is doubtful or ambiguous, that we should be justified in putting any qualification whatsoever upon it. But there is no such necessity here. The words are precise, and the meaning is perfectly clear. We cannot admit the reasoning upon this point of the Counsel for the Defendants, nor the interpretation which the Collector, in his defence, appears to have placed upon his own act with reference to the law. We do not find that he anywhere asserts, that the estate placed fourth in the *Calcutta* Gazette, which bears a lower number on the *Towjee*, and was sold after the disputed estate, which bears a higher number, is not a settled estate, or is borne on any other *Towjee* than that of the general rent-roll of the district. We presume that there is but one *Towjee* or rent-roll in a District for all settled estates in that District; and as we cannot allow that a classification of estates according to the nature of their arrears and a District *Towjee* are one and the same thing, we must hold that there has been a clear violation in this case of the provisions of section 14 of the sale law, and consequently, that under the plain terms of that section the sale was illegal. It is possible that the form attached to the Board's Circular of the 18th of *April*, 1845, may have misled the Collector regarding the order in which the sales of these estates were conducted. But with this we have nothing to do; and indeed, the Board's Circular

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refers solely to the orders of notification, and has no reference to the sale. As to the argument which has been addressed to us by the Respondent's Pleader, to the effect that an error or irregularity which may have taken place in the conduct of the sale cannot now in appeal be noticed, inasmuch as it was an error or defect of a technical nature, and consequently one which was corrected by Act, No. IX. of 1854, we would observe that that law only refers to errors, defects, or irregularities of procedure in Courts of Civil Judicature, not to rules of law or conditions which affect the substantive rights of the parties. In the transfer of property from a defaulter to a purchaser under Act, No. I. of 1845, the intervention of the Collector is by law necessary, and certain rules are therein laid down, all of which are conditions essential to the validity of the sale. The rules laid down in section 14 of the sale law, are prescribed with a view to prevent the officer holding the sale from capriciously putting up an estate out of its order on the rent-roll, and thereby surprising intending purchasers, and inflicting an injury, it may be, on the defaulting proprietor. They are in their nature, no doubt, purely arbitrary; but, notwithstanding their nature, the observance of them is necessary, under the law, to give a purchaser an indefeasible title, and to prevent the defaulter from setting aside the sale on the score of irregularity. Whether these rules have or have not been strictly observed out of Court is the main point of inquiry. When a suit like the present comes before a Court of Justice, any overlooking, or misconception, or disregard of these necessary, and, therefore, material, though arbitrary rules, is a violation of the conditions of the sale, materially affecting the sub-

stantive rights of the parties before the Court, and necessarily vitiates the sale. Act, No. IX. of 1854, only regards technical errors of procedure in the Lower Courts, which are not productive of injury to either party. If the case has been decided below on the merits, without a proceeding being drawn up under section 10 of *Ben. Reg.* XXIV. of 1814, or with a disregard of an objection to the over-valuation or under-valuation of suit, or non-sufficiency of stamp, such irregularities of procedure in Court, which cannot interfere with the substantive rights of any party, fall within the purview of Act, No. IX. of 1854, and cannot be noticed in appeal. But, with the substantive rights of parties, or with rules of law which affect those rights, Act, No. IX. of 1854, has nothing to do. These remarks are of general application, and we have thought it necessary to record them from a conviction that a very considerable misapprehension prevails as to the scope of Act, No. IX. of 1854. The effect of the irregularity in the conduct of the sale which has been established in this case, is simply to invalidate the sale, and bring back the parties to their *status quo* before the sale, and subsequent to the default. It does not remedy the Plaintiff's default, and consequently, does not enable us to restore him to the actual beneficial possession, of which he was deprived on the date of the default, by the operation of the sale law. This being so, we have considered whether it may not be argued, with some show of reason, that inasmuch as the Plaintiffs have sued for a reversal of the sale as a means of recovering possession of their estate, and as we are unable to pass any order regarding beneficial possession, the reversal of the sale only can be of no

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benefit to them, and is not a remedy to which they are of right entitled. Their interests in the property, it may be argued, ceased from the day on which their default occurred; and subsequent to that date they retained no rights, except to the sale proceeds. The regularity or otherwise of the sale, it may be said, is a matter between the Government, as vendor, and the auction purchaser, as vendee, with which the defaulter can have no concern. This argument, however, assumes, that the defaulter is placed in a very different position, from that which, in our opinion, he occupies under the sale law. It is true that if a balance exists against an estate after sunset on the latest fixed day of payment, the owner of the estate cannot, by the payment of the balance, of right retain it. It is open, however, to the Revenue authorities, under section 11 of the Act, to receive his balance, at any period previous to the sale, and restore to him his full rights. It is unquestionable, therefore, that the defaulter retains a valid subsisting interest; in fact, the right of ownership—in the property, until its actual alienation by a legal sale; and that if an illegal sale has taken place, it is of the greatest importance to him to obtain its reversal, in order that this right or interest may be revived, and he may be replaced in a position to enable him, through the influence of the Revenue authorities, to recover the actual possession of his estate. We observe, however, that in this case the Plaintiffs do not sue for the reversal of the sale solely as a means of recovering possession. On the contrary, in their plaint, they press their prayer for the reversal of the sale, and that for possession of the estate, distinct from each other; and it is obvious, from their pleading, that possession was not the sole

object they had in view ; for their contention partly is, that, owing to the estate having been sold out of its order, they have obtained a very much smaller price for it than they otherwise would, and as they cannot calculate the amount of damage which they have sustained by this irregularity, their only remedy clearly lies in a re-sale, and to this we consider that they are, under the law, fully entitled, irrespective of their claim to possession. Under the foregoing considerations, it is ordered, that the decree of the Principal *Sudder Ameen* be reversed ; that the sale, in consequence of its having been held in opposition to the provisions of Act, No. I. of 1845, be cancelled ; that agreeably to section 25 of that Act, the purchase-money be refunded, with interest, to the auction purchaser by Government ; that both parties be restored to the position they severally occupied subsequent to the default and previous to the sale, and that the costs of both parties be charged to Government ; that the Appellants recover the costs of this Court, agreeably to the account prepared by the accountant, with interest from this day to the day of final realization from Government ; and that, in order to obtain the costs of the *Zillah* Court, they must petition the *Zillah* Court, whence, in accordance with a Circular Order passed on the 4th of *July*, 1836, an order will be passed for the same to be paid."

The present appeal was from this decree.

As the Respondents did not appear, the appeal was heard *ex parte*.

The Solicitor General (Sir R. Palmer) and Mr. *Leith*, for the Appellants.

The requirements of the law as to public sale by

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the Government Collector for arrears of revenue have been substantially complied with, due regard being had to sections 5 and 14 of Act, No. I. of 1845. Admitting that there was an informality or irregularity in the sale, it was immaterial, and is cured by Reg. IX. of 1854, as no special injury or damage to the Respondents has been shown to have resulted therefrom. The sale ought not, therefore, to have been set aside by the Court. The Act, No. I. of 1845, nowhere declares in express terms that a sale shall be void, or shall be set aside, if not made in exact accordance with the provisions of section 14 of that Act; which provisions, we submit, are merely directory as regards the Collector and the executive officers of the Government, and do not affect the title of the auction purchaser. The late *Maharajah Roodur Singh* was a *bona fide* purchaser at the sale, which became final and conclusive under the express provisions of section 19 of Act, No. I. of 1845; and, therefore, the sale ought not to have been set aside by the Court on the ground of irregularity on the part of the Collector in its conduct. The remedy, if any, of the Plaintiffs, was a personal action for damages against the Collector, by whose act they considered themselves aggrieved.

The Right Hon. Dr. LUSHINGTON :

Their Lordships are of opinion, that the judgment of the *Sudder Court*, now appealed from, is right. They think it important that the regularity of Government sales, under the Act, No. I. of 1845, for arrears of revenue, should be strictly observed.

MUSSUMAUTH ANUNDMOYEE CHOW- } *Appellant,*  
 DHOGRAYAN ... }

AND

SHEEB CHUNDER ROY and others ... *Respondents.\**

*On appeal from the Sudder Dewanny Adawlut at Calcutta.*

THIS appeal arose out of a suit instituted by *Neelkunj Gooptoo*, as the next friend of a minor, named *Bhairub Chundro*. The object of the suit was to establish the minor's rights, as adopted son, to succeed as heir of *Kirttee Chundro Chowdhuree*; and also to set aside the adoption of one *Gerish Chundro*, under an *Unoomotee Puttur* (a deed giving power to adopt), alleged to have been made by *Bhoban Chundro*

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This Court will not apply to pleadings in the Native Courts, the strict rule, that averments in a plaint not traversed in the answer, are to be taken as admitted.

\* *Present.* Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

*Assessors*.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

In a suit to establish a deed of *Unoomotee Puttur* (permission to adopt), which was never registered, and

which power to adopt had not been exercised by the deceased's widow for nearly twenty years, the plaint set out the deed and relied upon the adoption. The answer did not traverse the alleged deed and the adoption made in pursuance thereof, but denied generally the title of the Plaintiff. Held, in absence of proof of the execution of the deed of *Unoomotee Puttur*, that the omission to traverse the allegation of its execution was immaterial, as the Plaintiff was bound to prove his case by evidence, which he had failed to do.

*Quære*.—If under section 33 of *Ben. Reg. X. of 1793*, an adoption by a minor and ward of Court of a son, without the consent of the Court of Wards, is wholly void,

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*Chowdhuree*, the surviving son of *Kirtee Chundro Chowdhuree*.

The Appellant's case was, that *Kirtee Chundro Chowdhuree*, on the 30th of *May*, 1828, shortly before his death, executed an *Unoomotee Puttur* and delivered the same to the Appellant, his wife, which deed authorized her in the event of the death of his two natural sons, who were sickly, to adopt a son: that she had exercised the power so given her, by adopting *Bhairub Chundro*. The genuineness of the deed of *Unoomotee Puttur* was denied by the Respondent, and the adoption of *Gerish Chundro*, by *Hurromonee*, the widow of *Bhoban Chowdhuree*, the surviving son of *Kirtee Chundro Chowdhuree*, relied upon by him.

The principal facts of the case were as follows:—

*Kirtee Chundro Chowdhuree*, died on the 23rd *Jois-tee*, 1235, leaving only two sons, *Juggut Chundro Chowdhuree*, and *Bhoban Chowdhuree*, his joint heirs, in equal undivided moieties, according to Hindoo law, and the Appellant, his sole widow him surviving.

The two sons were both minors at the time of the death of their father. The elder son did not long survive his father. He died on the 3rd of *December*, 1828, a minor, intestate, and without having been married, leaving the Appellant, his mother, and, as such, his heir according to Hindoo law, entitled to succeed to his one-half undivided share in the whole of the property left by his father. The other brother died on the 19th of *December*, 1844, a minor, and intestate, without leaving any issue; but leaving *Hurromonee*, his sole widow, an infant of tender years, and his heir according to Hindoo law, entitled to his one undivided moiety of the share in the *Zemindary*, to be held by her for life.

In the year 1846, *Hurromonee* put forward *Gerish Chundro* as a son adopted by her under the authority of an *Unoomotee Puttur*, which deed she alleged had been made by *Bhoban Chundro Chowdhuree*, her husband. At the time this deed was executed, he was a minor and ward of Court, but there was no authority granted by the Court of Wards, as required by *Ben. Reg. X. of. 1793, sec. 33*, to enable him to adopt a son.

A suit, No. 34, of 1846, was afterwards instituted by *Hurromonee* in the Civil Court of *Zillah Mymensingh*, against a third party, for the purpose of indirectly setting up and establishing this adoption. The Appellant intervened in the suit as a party objector, and in a petition denied the validity of *Hurromonee's* alleged *Unoomotee Puttur*, and her power to adopt a son. On the 2nd of July, 1847, the Principal *Sudder Ameen*, after hearing evidence on the point, dismissed the suit.

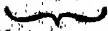
The Appellant afterwards, on the 30th of November, 1847, under the alleged *Unoomotee Puttur* from *Kirtee Chundro Chowdhuree* adopted *Bhairub Chundro*.

In consequence, *Hurromonee* instituted a suit in the same *Zillah Court*, against the Appellant, her mother-in-law, and one *Bhugobutty Gooptah*, who claimed the right to hold a hereditary *Tolook*, granted by the late *Kirtee Chundro Chowdhuree*, as Defendants. In her plaint in that suit, she stated (amongst other things) that *Bhoban Chundro Chowdhuree*, her late husband, being ill of fever, and being childless, executed in her favour an *Unoomotee Puttur*, for the purpose of taking five adoptions consecutively, and subsequently died that very night; that she had accordingly adopted a son, under the name of *Gerish*

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*Chundro*, according to the *Shasters*; that, after that the Appellant by violence dispossessed her of a moiety of the *Zemindary*, and she alleged, that the Defendant, the Appellant, bought *Bhairub Chundro*, the son of *Neelkunth Gooptoo*, in *Augroon*, 1254, and had adopted him; though, as she charged, she was not competent to make any adoption in the life of the son adopted by herself, and that as it was contrary to the *Shasters*, she, *Hurromonee*, claimed the whole of the property of *Kirtee Chundro Chowdhuree*, with mesne profits. The Appellant, by her answer to the plaint, traversed and denied the making of an *Unoomotee Puttur*, by the late husband of the Plaintiff, *Hurromonee*, and alleged that it had been fabricated, and also denied that her husband had ever given *Hurromonee* any permission to adopt a son. The answer further stated that Appellant had been empowered by the *Unoomotee Puttur* of her husband, *Kirtee Chundro Chowdhuree*, to take, in the event of their two son's deaths, three other sons, consecutively, into adoption: and that she had accordingly made the adoption of *Bhairub Chundro*.

*Neelkunth Gooptoo*, the natural father of *Bhairub Chundro*, then instituted the suit in which the present appeal arose, as the guardian or well-wisher of his infant son. The plaint was filed in the same *Zillah* Court against *Hurromonee*, and the Appellant, as widow of *Kirtee Chundro Chowdhuree*, with some others, as Defendants. The Plaintiff stated, that he sought to recover possession of a one-third of 2 annas 15 gundas of the *Zemindary* and other property therein described, together with *wasilat*, by cancelment of an illegal adoption made by the Defendant *Hurromonee*. The plaint averred, that the late *Kirtee*

*Chundro Chowdhuree*, the adoptive father of the minor, in order that, the funeral cake and water should be perpetuated, and the property protected, had, on the 18th *Joistee* of the year 1235, executed, in the presence of witnesses, an *Unoomotee Puttur*, authorizing the Appellant to adopt consecutively three sons, and died on the 23rd of the aforesaid month; and that after this, the Appellant according to the conditions of the *Unoomotee Puttur* of her husband, being desirous of adopting a son, he and his wife, *Kripa-mooyee Gooptoo*, gave their second son, *Bhairub Chundro*, a minor, on the 15th *Augroon* of the year 1254; and that the Appellant, in conformity, with the *Shasters*, took and adopted him, naming him *Bhairub Chundro Chowdhuree*, after performing the *putristo jag*, &c., and gave information of it to the Judges. The plaint also averred, as to the *Unoomotee Puttur* set up by the Defendant, *Hurromonee*, that it was never executed by her husband.

The answer of the Defendant, *Hurromonee*, did not contain any traverse or denial of the averments respecting the execution by the late *Kirtee Chandro Chowdhuree* of the deed of *Unoomotee Puttur*, averred in the plaint; nor did the answer contain any denial of the fact also averred in the plaint that his widow, the Appellant, had received authority from him to adopt sons, in the event of their own two natural-born sons dying, but pleaded that, as a period of twenty years had elapsed, under such circumstances the suit was barred under sec. 14. *Ben. Reg.* III. of 1703, and denying generally the Plaintiff's title, relied upon the validity of her own adoption of *Gerish Chundro*, under the *Unoomotee Puttur* of her deceased husband.

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The replication of the Plaintiff met the plea of the Regulation of Limitations by the Defendant, *Hurromonee*, by first referring to the *Unoomotee Patur* executed by *Kirtee Chundro Chowdhuree*, and to the adoption by the Appellant thereunder, on the 30th of November, 1847, of the Plaintiff's son, by which, as it was submitted, he became the rightful successor to his adoptive father's real and personal property, and by then pleading that the suit had been instituted at the expiration of one year from the date of the adoption, which, it was insisted, took the case out of the operation of the Regulation of Limitations.

Pending the suit the Defendant, *Hurromonee*, died, when the Respondent, *Sheeb Chundro Roy*, as the natural father of her adopted son, the minor, *Gerish Chundro*, was admitted in place of *Hurromonee* as a Defendant.

The hearing of both suits took place together, before *Norshurree Seeromonee*, the Principal *Sudder Ameer* of the *Zillah* of *Mymensingh*, on the 26th of May, 1852, when he pronounced judgment. The material portion of which was as follows :—" *Hurromonee* has instituted a suit, No. 2, in order to have the alleged adoption by *Anundmoyee Chowdhoorayan* disallowed, and thereby to recover possession of the property claimed in this suit; and, as the Plaintiff, also being appointed the well-wisher of *Bhairub Chundro*, the adopted son of *Anundmoyee* aforesaid, has instituted this suit against *Hurromonee* and *Anundmoyee* and others, Defendants, in order to have the adoption of *Gerish Chundro* by *Hurromonee* disallowed, and to recover possession of the disputed property; and as the grounds of both the suits are one and the same, it was, therefore, ordered that both suits should be tried and decided

together. Accordingly, this suit has been tried and determined along with the above-mentioned suit of *Hurromonee*; and, in my opinion, recorded this day, the adoption of *Bhairub Chundro* by *Anundmoyee* has not been satisfactorily proved, the same is set aside, and the suit of *Hurromonee* aforesaid decreed in her favour, the reasons thereof apply also to this case," and it was ordered, that that suit be dismissed; and the Principal *Sudder Ameen* further held, that the *Unoomotee Putter* executed by *Hurromonee's* husband was proved, as well as the adoption made under it, and finally ordered, that the claim of *Hurromonee* was good and tenable, and that the objections of both the female Defendants were false and fraudulent, further ordering that *Anundmoyee* was to have during her lifetime, food and raiment; and the case was accordingly so decreed.

*Neelkunth Gooptoo* appealed against this decree to the *Sudder Dewanny Adawlut* at *Calcutta*.

The minor, *Bhairub Chundro*, subsequently died, leaving the Appellant, his adoptive mother, his heir, according to Hindoo law, him surviving; and under an order of the Court, the Appellant was made a party, as his heir, to carry on the appeal.

The decree in *Hurromonee's* suit (No. 2) was also appealed to the *Sudder Dewanny Adawlut* by the Appellant, and that appeal was marked No. 317, while the appeal in the other suit was marked No. 316.

The hearing of the last-mentioned appeal, No. 316, came on before the *Sudder Dewanny Adawlut* on the 30th of *April*, 1855, when it was determined by the Judges of that Court, consisting of Messrs. *Abercrombie Dick*, *Raikes*, and *Patton*, that the other appeal, No. 317, should be heard and disposed of by

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them first; and that, afterwards, the hearing and decision of the appeal No. 316 should take place. The Court accordingly took up the appeal No. 317, in the suit No. 2 of the late *Hurromonee*, and entered upon the hearing thereof separately, and thereupon directed the Pleader of the Appellant to confine his argument to one issue, namely, whether the *Unoomotee Puttur*, under which the late *Hurromonee* had adopted *Gerish Chundro* was a valid deed, as that was the ground on which her suit, No. 2, was founded.

The *Sudder Dewanny* Court delivered judgment on that point, reversing the decree of the Principal *Sudder Ameen* made in that suit, as follows:—"The law declares, that no adoption by disqualified landholders is to be deemed valid without the consent of the Court of Wards, on application made to them through the Collector, sec. 33, *Ben. Reg. X.* of 1793. It follows, necessarily, that no power to adopt can be granted by such a person without the consent of the Court of Wards. *Bhoban Chundro Chowdhuree*, the person who granted the power, to adopt, on which the suit is founded, was at the time a ward of that Court, and the consent of the Court of Wards was neither asked for nor obtained. It is, therefore, invalid, and the suit of the Plaintiff must be dismissed: The decision of the Principal *Sudder Ameen* is reversed, and the appeal decreed, with full costs, against the Plaintiff."

No appeal was brought from this decree.

The Court immediately afterwards took up the appeal No. 316, and on the same day decreed as follows:—"The deed was written several days before the decease of *Kirtee Chundro Chowdhuree*, the giver of it, and, therefore, might easily have been registered. It was, however, never made

public until nearly twenty years after its date. There is no proof, that it was ever made known to any of the members of the family. It was not mentioned when the elder of the two legitimate sons of *Kirtee Chundro Chowdhuree*, died, and, what is most extraordinary, was not produced and acted upon at the time of the decease of the younger son, *Bhoban Chundro Chowdhuree*. It was at length produced, and a son adopted in virtue of it, after *Hurromonee*, the widow of *Bhoban Chundro Chowdhuree*, had adopted a son under an alleged power from her husband. It is, too, in so mutilated and dirty a state as to defy all examination into the nature of the stamp and the date of its sale by the stamp vendor. Under these circumstances, it is utterly unworthy of credit. The appeal is, therefore, dismissed with costs, and the decision of the Principal *Sudder Ameen*, rejecting the *Unoomotee Puttur* of *Mussumauth Anundmoyee*, confirmed."

The present appeal was from this last decree.

The Respondents did not appear, and the appeal was therefore heard *ex parte*.

Mr. *Leith*, for the Appellant.

As the fact of the execution of the *Unoomotee Puttur* by *Kirtee Chundro Chowdhuree* was averred in the plaint, and not traversed or denied by the answer of the Defendant, *Hurromonee*, it ought to have been considered by the Courts below as admitted on the pleadings, and as not requiring to be established by evidence. Now, the fact of the *Unoomotee Puttur* having been thus admitted, the adoption under it of the late minor, *Bhairub Chundro*, must also be taken as having been proved; and such adoption was valid by Hindoo law and custom. As respects the decree of the Principal *Sudder Ameen*, that decree was

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made on the hearing and consideration by that Judge of the pleadings filed and evidence given in another and distinct suit, to which neither the Plaintiff, nor the minor, *Bhairub Chundro*, was a party; and that suit was improperly heard by the Principal *Sudder Ameen* with the suit out of which the present appeal has arisen. It is, therefore, submitted, that any alleged act of the Appellant, as the widow of *Kirtee Chundro Chowdhuree*, to whom the authority to adopt was given by the deed, or any omission or delay on her part, ought not to have been used by the *Sudder Court* so as to prejudice, much less to destroy, the rights of the minor, *Bhairub Chundro*, as the adopted son and heir of *Kirtee Chundro Chowdhuree*. If the evidence was weak of the execution of the power to adopt, as it was not impugned, it was sufficient. The substitution by the Court of the Appellant in the place of her deceased adopted son was most irregular: it made her both Plaintiff and Defendant.

The case stood over for consideration.

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Judgment was now pronounced by

The Right Hon. Lord KINGSDOWN :

The Appellant is the widow of one *Kirtee Chundro Chowdhuree*, who died in 1828, leaving two sons. The elder, *Juggut Chundro*, died a few months after his father, unmarried and intestate. The younger, *Bhoban Chundro*, died in December, 1844, a minor and childless, but leaving a widow, *Hurromonee*. Shortly after his death *Hurromonee*, under an *Unoomotee Puttur*, or authority to adopt, which she alleged her husband had executed in her favour on the night of his death, adopted one *Gerish Chundro*, as the son and representative of *Bhoban Chundro*. And, in the year 1847, the Appellant, who disputed *Hurromonee's*

right to adopt, set up an *Unoomotee Puttur*, which she alleged had been executed in her favour by *Kirtee Chundro Chowdhuree*, on the 20th of May, 1828, and under that instrument adopted the son of one *Neelkunth Gooptoo* as the son and representative of her husband, *Kirtee Chundro Chowdhuree*, and gave him the name of *Bhairub Chundro Chowdhuree*.

These rival adoptions gave rise to two suits, which it will be convenient to distinguish by the numbers 316. and 317, by which they were known in the *Sudder Dewanny Adawlut*.

Suit, No. 316, in which the present appeal is presented, was instituted in 1849, on behalf of *Bhairub Chundro*, a minor, by his natural father, *Neelkunth Gooptoo*, as his well-wisher, or next friend, against the present Appellant, *Hurromonee*, and several other persons as Defendants. The plaintiff stated the execution of the *Unoomotee Puttur* by *Kirtee Chundro Chowdhuree*; the adoption of the infant Plaintiff under it; his title by virtue of that adoption, to one-third of the estate of *Kirtee Chundro Chowdhuree* in immediate possession, and to the other two-thirds, subject, as to one of them, to the interest of the present Appellant, as heiress-at-law of her eldest son; and subject, as to the other, to the life interest of *Hurromonee*, as heiress of her husband; and it claimed the possession of one-third of the *Zemindary*, and some personal property as against the two female Defendants with *wassilat*; and as against *Hurromonee*, the cancelment of the adoption made by her as illegal. The other Defendants had no interest in the property, and seem to have been made Defendants only because they had taken part in the adoption by *Hurromonee*. To this suit, therefore, the

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Appellant, through no doubt a friendly, was a substantial, Defendant.

Shortly before the institution of suit, No. 316, *Hurromonee* had commenced the suit, No. 317. The only Defendants to this were the Appellant and another woman. It set up the adoption made by *Hurromonee*, and claimed by virtue of that and other acts of the Appellant, the whole of the property as against her, disputing the adoption made by her. In this suit the Appellant pleaded the *Unoomotee Puttur* alleged to have been executed by her husband, and insisted on the validity of the adoption made by her under it.

*Hurromonee* died before either suit came to a hearing, and certain proceedings were had by which *Gerish Chundro*, the infant adopted by her, became, through his well-wisher or next friend, a Defendant in suit, No. 316, and the Plaintiff in suit, No. 317.

The two suits were heard together by the Principal *Sudder Ameen*, in whose Court they were pending. In the suit, No. 317 he decided in favour of the Plaintiff, *Gerish Chundro*, affirming the validity of his adoption by *Hurromonee*; treating the *Unoomotee Puttur* set up by the Appellant as not established by proof, and the adoption thereunder as invalid. Upon the same grounds he decided against the title of *Bhairub Chundro* in suit, No. 316, and dismissed that suit with costs.

Appeals were preferred to the *Sudder Dewanny Adawlut* against both decisions. That in suit, No. 316, was, in the first instance, an appeal on behalf of the infant Plaintiff, *Lhairub Chundro*, by his father and well-wisher. The appeal in suit, No. 317 was that of the present Appellant.

Before the appeals were heard, *Bhairub Chundro*

died; and the present Appellant (being, on the assumption of his adoption being valid, his heiress-at-law) seems, on her own application, to have been substituted for him as Appellant in suit, No. 316, notwithstanding her character as Defendant in that suit. She thus became, regularly or irregularly, *domina litis* in both appeals.

These appeals were heard by the *Sudder Dewanny Adawlut* in 1855. In suit, No. 317, the Court reversed the decision of the Principal *Sudder Ameen*, mainly on the ground that *Bhoban Chundro* being an infant at the time of his death, had no power to make the instrument under which *Hurromonee* claimed the right to adopt, without the consent of the Court of Wards; and, therefore, that the adoption of *Hurromonee* under it was wholly void. Against that decision there has been no appeal.

In suit, No. 316, the Court dismissed the appeal, and confirmed the decision of the *Zillah* Court, holding that the *Unoomotee Puttur* under which the Appellant adopted *Bhairub Chundro* had not been proved, and was wholly unworthy of credit. Against this decision the present appeal is preferred.

The decision in suit, No. 317, has determined the interest of the party claiming under the adoption by *Hurromonee*; and the various deaths that have occurred have vested the whole interest in the estate, at least during her life, in the Appellant. It is not, therefore, surprising that the present appeal has come on *ex parte*. Their Lordships, however, do not the less feel the difficulty in which every *ex-parte* appeal places them, of having to decide the questions raised after hearing one side only.

The first and most important question is, whether the decision of the Principal *Sudder Ameen* was, when

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pronounced, a correct decision of the issues then pending before him between the then parties to the suit. No subsequent event, or devolution of interest, can affect this question; because to give effect to these, should justice require it, would be the office not of an appeal, but of some supplemental proceeding.

The question in the suit was the title of *Bhairub Chundro*, as the adopted son of *Kirtee Chundro Chowdhuree*, to recover certain property, and to have another adoption cancelled. The foundation of this title was the *Unoomotee Puttur* under which he was adopted. If the proof of that failed, he had no title, and his suit was properly dismissed.

It is not now contended, that there is before their Lordships, or was before the Principal *Sudder Ameen*, testimony strong enough to establish the validity of the instrument, if impugned. But it is argued that the evidence which the Principal *Sudder Ameen* treated as too weak for that purpose, was irregularly taken, because it was taken in suit, No. 317, to which *Bhairub Chundro* was not a party. It is further argued that proof of the instrument by witnesses was unnecessary, because the answer of *Hurromonee* did not impeach, and must, therefore, be taken to have admitted its validity. These two objections shall be considered separately.

Their Lordships are not satisfied that the depositions of the witnesses examined in support of the *Unoomotee Puttur* (which are not before them) were not substantially taken in both the suits, which were clearly tried together. It appears from a passage in the record before us, that the father and next friend of *Bhairub Chundro*, in his reasons of appeal, comments on this evidence; and at the hearing in the *Sudder Dewanny Adaulut* the Appellant's Pleader

argued upon it. But suppose it to be out of the case, what is the result? Why, that the Plaintiff has given no evidence whatever in support of an averment material to his title. The only question that can remain is, whether there has been an admission of that averment sufficient to relieve him from the necessity of giving any such evidence.

Their Lordships cannot answer this question in the affirmative. The answer of *Hurromonee* denies generally the truth of the Plaintiff's case. If it does not directly impugn the instrument, it does not in terms admit it. The defence is no doubt mainly directed to the avoidance of the adoption by the Appellant by setting up the adoption made by the Defendant, *Hurromonee*; but it does not admit that if the latter adoption fails, the other is necessarily valid.

Their Lordships cannot apply to the pleadings in these Courts the strict rule that averments not traversed must be taken to be admitted; and they are not prepared to say that the answer contains an admission which, even as between the Plaintiff and *Hurromonee*, would have dispensed with the necessity of proving the instrument. But when the case was heard, the issue was no longer one between the Plaintiff and *Hurromonee*. She was dead, and *Gerish Chundro* had been admitted as a Defendant on the record. He did not come in as the heir of *Hurromonee*, for, if he were duly adopted, his title was paramount to hers. He would not then have been bound by her admissions of an instrument (even had they been more unequivocal than they are), the execution of which had been formally made one of the issues in the suit. Their Lordships, therefore, can see no ground for disturbing the decree of the Principal *Sudder Ameen*.

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The next question is, whether any case has been made for reversing or varying the decree of the *Sudder Dewanny Adawlut*. It has been argued that the substitution of the Appellant for *Bhairub Chundro*, which made her both Plaintiff and Defendant in the suit, was grossly irregular. It may have been so; but it was an irregularity of her own seeking. If she had not taken up the appeal, it must either have been prosecuted by the well-wisher and next friend of the deceased infant (if the forms of the Court permitted this), or abandoned by him. Their Lordships must assume that the decree of the *Zillah* Court, which they think to be correct, would in either case have stood. The Appellant on her own application has been allowed, perhaps irregularly, to contest the correctness of that decree. She has done so unsuccessfully, and it is but fair that she should be left to pay the costs of the proceedings.

The Appellant is now entitled, as a Hindoo female heiress, to the whole estate; if she makes any further adoption, the validity of that adoption will be probably tried between the party adopted and those who will be the heirs of her husband on her death. In any such suit it is difficult to see how these decrees can be admitted as evidence for the purpose of showing the invalidity of the instrument of adoption.

At any rate their Lordships think it would be objectionable to disturb or vary decrees properly made by the *Zillah* and *Sudder* Courts in this suit, for the mere purpose of guarding against the possible error of some other tribunal in some future suit, and the only order which they can recommend Her Majesty to make on this appeal is, that it be dismissed.

VARDEN SETH SAM

... *Appellant,*

AND

LUCKPATHY ROYJEE LALLAH, BUN- }

HAH LALL, SADASEVA TANKER, } *Respondents.\**

and JAMES OUCHTERLONY ... }

*On Appeal from the Sudder Dewanny Adawlut at  
Madras.*

THE question in this case related to the validity of a lien, created by deposit of the title deeds of an estate called the *Muttah* of *Tirupassur*, in the Presidency of *Madras*, in consideration of pecuniary advances made by the Appellant for the benefit of that estate.

The facts were these :—

In the year 1851, *Gulam Asen Khan Bahadoor*,

\* Present : Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.


*Assessors*.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

3rd July,  
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*Mad. Reg.*  
II., of 1802,  
sec. XVII.,  
enacts, that  
in the absence  
of any posi-  
tive law to  
the contrary,  
in force in the  
Presidency of  
*Madras*, that  
the decision  
of the Court  
is to be ac-  
cording to  
justice, equity  
and good  
faith.

The Plain-  
tiff was an Armenian and the Defendants, Hindoos, Mahomedans, and Christians. The Plaintiff sought by the plaint to establish a lien on land, created by an equitable mortgage by deposit of title deeds. Held (in the absence of any agreement that the transaction was to be governed by any particular local law), that, under *Mad. Reg.* II., of 1802, sec. XVII., the principles of English law respecting equitable mortgages applied.

S. purchased the *Muttah* of E., and paid part of the consideration money. When the parties came to complete, the vendors had not the title deeds, but they promised to deliver them in a few days, and arranged that the remaining part of the purchase money should be retained by the purchaser, and they handed over to him the title deeds

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and his father, *Sharpul Umra Sahib*, were in possession of three *Muttahs*, or Districts of villages, called respectively the *Muttah* of *Tirupassur* (otherwise called *Tripassur*), and the *Muttah* of *Ekattur* (otherwise called *Yagatoor*), situate in Districts of *Periyapalam*, and the *Muttah* of *Madhuravayul*, in the *Talook* of *Sydapetta*, all in the Presidency of *Madras*.

In the month of *September* of that year, the three *Muttahs* of *Tirupassur*, *Ekattur*, and *Madhuravayal* were attached by the Collector for *kist* due to Government, amounting to Rs. 8,049. 4a.; and the Collector advertised the *Muttahs* for sale in *October* following, for the arrears.

In this state of things, *Gulam Asen Khan* and his father, applied to the Appellant for assistance to prevent the sale, and offered to sell to him the *Muttah* of *Tirupassur* for Rs. 4,000, and the *Muttah* of *Ekattur* for Rs. 11,000, and stated that, except the claim of the Collector for arrears of revenue, there were no incumbrances affecting the properties; and it was, ultimately, on the 15th of *September*, 1851, agreed between them that the Appellant should purchase the *Muttah* of *Ekattur* for Rs. 11,000, and have the option of purchasing that

of another *Muttah*, called *T.*, to be held as security for their delivering to the purchaser the title deeds of *Muttah E.*, in order to perfect his title. The purchaser, on the faith of this advanced large sums, and paid off a mortgage on *Muttah T.* This latter *Muttah* having been sold, *S.* brought a suit to recover the amount advanced by him on account of that *Muttah*, claiming to be equitable mortgagee, and to have a charge on that estate for the advances made by him in respect thereof. Held, that the transaction created a lien, and bound the *Muttah T.* for the advances made by *S.*

*Semle.*—By the Mohamedan law such a deposit for a security in respect of a contingent loss would be in the nature of a trust, not a pawn.

The registration of the name of a party in possession of land, on the Collector's books, as owner, is not conclusive evidence of his title, as the land may be affected by prior equitable charges, and it is the duty of a purchaser to investigate the prior title.

of *Tirupassur* for Rs. 4,000; and that out of the Rs. 11,000, the purchase-money for the *Muttah* of *Ekattur*, he should pay to the Collector of the District Rs. 8,049. 4a. in discharge of what was due for arrears of revenue.

Under this arrangement, the Appellant, on the 15th of September, paid Rs. 200 to *Sharpul Umra Sahib*, in part performance of the agreement for purchase of the *Muttah* of *Ekattur*. The Appellant also, in order to prevent the sale of the three *Muttahs*, paid to the Collector the sum of Rs. 8,049. 4a. in discharge of the arrears.

The Appellant having thus paid the sums of Rs. 200 and Rs. 8,049. 4a., in respect of his purchase of the *Muttah* of *Ekattur*, attended on the 14th of October following, at the house of the vendors, to complete his purchase, when *Gulam Asen Khan*, by the desire of *Sharpul Umra Sahib*, his father, executed to the Appellant a Bill of Sale of the *Muttah* of *Ekattur*, and upon the Appellant calling for the title deeds of that to be delivered up to him, the vendors alleged that they were with some of their relatives, and said that they would send for them soon and deliver them to the Appellant. The Appellant, however, insisting that the title deeds ought to have been ready to be given up to him, they proposed and offered that, in the meantime, he should retain the residue of the purchase-money, and that they would deposit with him the title deeds of the *Muttah* of *Tirupassur*, to be held by way of equitable mortgage as a security for their delivering up to the Appellant the title deeds of the *Muttah* of *Ekattur*, in order to make his title thereto perfect; and, accordingly, *Gulam Asen Khan* delivered to the Appellant a Bill of Sale of the *Muttah* of *Tirupassur*, dated the 29th of December, 1834,

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LUCKPATNY  
ROYJEE  
LALLAH.



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from one *Taliputri Bapu Rayar* to *Arcot Jivana Rayar*, and another Bill of Sale of the same *Muttah*, dated the 30th of *June*, 1840, from *Arcot Jivana Rayar*, to *Gulam Asen Khan*, being the title deeds under which *Gulam Asen Khan* held the *Muttah*, and he also delivered to the Appellant a certificate of registration, granted by the Collector of the District to *Gulam Asen Khan*, dated the 8th of *July*, 1840.

On the 22nd of *November*, 1851, the Appellant, by the direction of *Gulam Asen Khan*, paid to one *Rajah Jankeeran*, by whom the sale had been conducted, on behalf of the vendors, a further sum of Rs. 300, on account of the purchase-money.

The *Muttah* of *Ekattur* consisted of five villages, one of which was the village of *Kunnattur*, and upon the Appellant proceeding to take possession of it under the sale to him, he discovered that the village of *Kunnattur* had been already sold by *Gulam Asen Khan* and *Sharpul Umra Sahib* to *Kakaji Rai* and others for Rs. 500. This fact was admitted by the vendors, and it was thereupon agreed between them and the Appellant that the sum of Rs. 500, should be deducted from the purchase-money of Rs. 11,000, by which the purchase-money for the *Muttah* of *Ekattur* became reduced to Rs. 10,500, of which sum the Appellant had paid the several sums of Rs. 200; Rs. 8,049. 4a., and Rs. 300. In the year 1853, the Appellant further discovered that the vendors had, before the sale to him in *September*, 1851, actually mortgaged the *Muttah* of *Ekattur* to one *Mahomed Usen Sahib*, who had possession of the title deeds thereof, and who had, in the year 1851, commenced proceedings, in the *Zillah* Court of the Principal *Sudder Ameen* of *Chingleput*, to recover what was due to him on such mortgage; and that the Defendants, the vendors,

had filed a *Razinamah*, or judgment by confession, in such suit, in which *Mahomed Usen's* mortgage claim on the *Muttah* was admitted; and it was agreed that in default of payment of the sum therein mentioned, the same should be recovered from the *Muttah*. In the month of *November*, 1843, *Mahomed Usen* proceeded to attach the *Muttah* for the sum of Rs. 5,761, then due to him on the mortgage and the *Razinamah*; and, in order to prevent the sale of the *Muttah* then under attachment, and to redeem the *Muttah*, and obtain possession of the title deeds, the Appellant, on the 12th of *December*, 1853, paid to *Mahomed Usen* the sum of Rs. 5,761, in satisfaction of the *Razinamah*, and received from him the title deeds of the *Muttah*.

In this manner, the Appellant had paid the various sums of Rs. 200, Rs. 8,049 4a., Rs. 300, and Rs. 4,761, for the purchase of the *Muttah* of *Ekattur*, and upon the security of the title deeds of the *Muttah* of *Tirupassur*, so deposited with him as aforesaid, making in the whole Rs. 14,310. 4a., being the sum of Rs. 3,810. 4a. over and above the amount of Rs. 10,500, the purchase-money of the *Muttah* of *Ekattur*, and for the repayment thereof held the equitable mortgage on the *Muttah* of *Tirupassur*, by the deposit of the title deeds of that *Muttah*.

In the month of *October*, 1855, the Appellant, having discovered that, during his absence from the neighbourhood, *Gulam Asen Khan* had caused the *Muttah* of *Tirupassur* to be transferred in the books of the Collector from his own name to the name of the Respondent, *Luckpathy Royjee Lallah*, and that they were then endeavouring to sell the same to the Respondent, *Nichterlowy*; filed a plaint in the Court of

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the Principal *Sudder Ameen* of *Chingleput*, the District in which the *Muttah* of *Tirupassur* was situate, against *Gulam Asen Khan*, *Sharpul Umra Sahib*, and the Respondent, *Luckpathy Royjee Lallah*, in the plaint called *Set Rakpati Roy Lala Sankar* to recover from them, and, as against the *Muttah* of *Tirupassur*, the sum of Rs. 3,810. 4a., with interest, amounting to Rs. 803. 15a. 5p., in all Rs. 4,614. 3a. 5p., and subsequent interest.

The Defendant, *Gulam Asen Khan*, by his answer, alleged that the Appellant was indebted to him. He admitted the sale by him to the Appellant of the *Muttah* of *Ekattur*, and the payment by the Appellant of the two sums of Rs. 8,049, 4a. and Rs. 300, but alleged, that he had not authorized the payment of the sums of Rs. 200, Rs. 500 and Rs. 4,761, before mentioned. The answer also alleged, that the Plaintiff borrowed from the Defendant the title deeds of the *Muttah* of *Tirupassur*, under the pretence that he wished to see the form of title deeds relating to *Muttahs*, and had not returned them; he admitted that the third Defendant had purchased the *Muttah* of *Tirupassur* from him, and enjoyed it for three years, and afterwards publicly sold it to the Defendant, *Ouchterlony*, who was then in possession of it. The answer further alleged, that the first and second Defendants had not mortgaged the title deeds of *Ekattur* to *Mahomed Usen* for Rs. 5,761, and insisted that the Defendant had not authorized the Appellant to pay that sum.

The second Defendant, *Sharpul Umra Sahib*, made default, and it was ordered that, as against him, the suit should be heard *ex parte*.

On the 21st of December, 1855, *Poonja Lala*, and

*Sadasiva Takar*, as *Vakeels* for the third Defendant, applied to the Court, praying, under the circumstances therein stated, that they might be permitted to put in an answer and defend the suit generally on his behalf; and on the hearing of such petition, it was ordered that the Plaintiff's *Vakeel* should include the Petitioners as Defendants in the suit, instead of the third Defendant.

A supplemental plaint was then filed, making *Ponna Lala* and *Sadasiva Takar*, Defendants to the suit; and by their answer they alleged that the third Defendant left in *September*, 1855, for *Biganir*, in the *Raj* of *Satadar*, which was 2,000 miles distant; and that the Plaintiff ought not to have brought the suit in the *Chingleput* Court, the parties being resident elsewhere; that the third Defendant was under no obligation to the Plaintiff, and that the Plaintiff had obtained no documents in connection with the *Muttah* of *Tirupassur*; and further, that the *Muttah* of *Tirupassur* had been registered by the *Circar* in the name of the third Defendant, and the certificate and *Sunnud*, &c., issued in his favour, and who had remained in unmolested and public enjoyment thereof up to four years previously; and that a short time previously to the institution of the suit, the *Muttah* had been sold to the Respondent, *Ouchterlony*, and was registered by the *Circar* in his name, and remained in his enjoyment; the answer then suggested that no benefit could be derived from the simple possession of the certificates, &c., of earlier date, by a party who had no interest whatever in them; and denied that any of the facts stated in the plaint in connection with the *Muttah* of *Tirupassur* had taken place.

The Appellant afterwards filed a supplemental plaint against *Ouchterlony*, making him a Defendant to

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the suit. *Ouchterlony* by his answer alleged, that he was utterly ignorant of the transactions between the Plaintiff, and the first and second Defendants, and that whatever claims the Plaintiff might have against those Defendants, yet that he had no legal claim whatever upon the *Muttah* of *Tirupassur*; he denied having had any conference with the first or second Defendants at any time on any subject; and insisted that the transaction between the third Defendant and him was valid and conclusive; that the third Defendant, alleging that the *Muttah* of *Tirupassur* was his own property, asked him to purchase it, and showed a Bill of Sale, which he was then unable to produce, but which was executed a long time ago, either by the first and second Defendants, or one of them, and that the *Muttah* had been registered in his name by the Collector, and that, as the third Defendant had in himself the title and enjoyment thereof, he, *Ouchterlony*, purchased it from him just as he had it.

The Appellant entered into evidence, and proved the several matters hereinbefore stated. The first Defendant and the sixth Defendant, also adduced evidence. The cause was heard by *T. Alaghiah*, the Principal *Sudder Ameen*, on the 14th of April, 1857, when that Judge pronounced judgment, declaring that the absence of a written agreement in favour of the Plaintiff could not vitiate his claim; for that it was quite clear the Plaintiff had a lien upon the first and second Defendants' estates long before the claim of the other Defendant began to exist; and that although those Defendants would not bring to notice in their pleadings the date of the deeds in their favour, it was certain by the depositions of their *Vakeels* taken at the hearing

of the cause, and by the other circumstances connected with it, that they did not acquire their right before the Plaintiff's claim to recover a surplus of Rs. 3,810. 4a. 1p. on the security of the estates, came into existence, and the Court decreed that the first and second Defendants should pay to the Plaintiff the amount claimed, with interest up to the date of the decree, and that the *Tirupassur Muttah* be held responsible for the same, and that the costs should be paid by the first and second Defendants to the Plaintiff, and the other Defendant.

From this decree the Respondents, *Ouchterlony* and *Luckpathy Royjee Lallah*, by his attorneys, the fourth and fifth Defendants, appealed to the Civil Court of *Chingleput*, and the Judge of that Court (Mr. *W. Dowdeswell*), on the 31st of *March*, 1858, pronounced the following judgment :— " It appears, from the evidence in this case, that the first Defendant sold the *Muttah* of *Ekattur* to the Plaintiff on the 14th of *October*, 1851, and deposited the title deeds of the *Tirupassur Muttah* with the Plaintiff as security, until he should deliver up the title deeds of the *Ekattur Muttah*. The first Defendant has in his answer, admitted the sale, and the delivery of the title deeds of *Tirupassur Muttah*. It must be here remarked, that the first Defendant had filed a *Razinamah*, in the suit No. 37, of 1851, on the file of the Principal *Sudder Ameen's* Court, in which he had admitted *Mahomed Usen's* mortgage claim over the *Ekattur Muttah*, and had agreed that, in default of payment of the sum stipulated in the *Razinamah*, the same should be recovered from the *Ekattur Muttah*. Notwithstanding this agreement, filed in the Court of the Principal *Sudder Ameen*, the first Defendant assured the Plaintiff (as stated in the Bill of Sale that there

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were no liabilities whatsoever on the property ; and it was entered in the Bill of Sale that 'in the event of there being any claim against the *Ekattur Muttah*, the first Defendant would hold himself 'responsible for clearing it off.' Subsequently to this sale having been effected, the *Ekattur Muttah* was attached in November, 1853, in satisfaction of the *Razinamah*, filed by first Defendant himself in the suit, No. 37, of 1851; and as the Defendant did not clear off the demand, the Plaintiff was forced to pay the mortgage claim of *Mahomed Usen*, amounting to Rs. 5,761, in order to get the *Muttah* released from attachment. The evidence shows that this sum of Rs. 5,761, was paid by Mr. *Lasar*, the Plaintiff's agent, and the receipt 'of it was acknowledged by *Mahomed Usen* in his petition, No. 705, of 1853. It is clear, then; that the Plaintiff could not have received the title deeds of the *Ekattur Muttah* till the year 1853, as they were not delivered back to *Mahomed Usen* by the Court till 1853; and he was clearly entitled to recover all sums paid by him over and above the price of the property which it was necessary should be paid, before the title deeds could be delivered to him, from the estate of *Tirupassur Muttah*, of which he held the title deeds as security. The Appellants set forth that the Court had no jurisdiction, the parties being residents in *Madras*; moreover, that the Plaintiff had on lien on the *Tirupassur Muttah*. With regard to the first objection, it is clear the property from which the Plaintiff sought to recover the money due to him, is situate within this *Zillah*, and, therefore, was cognizable by the Civil Courts. With regard to the second, the Plaintiff has shown he has a lien upon the property, by producing the title deeds of it, and

showing he held them as security, previous to the period at which the sale to the third Defendant, whose agents have appeared, was made. The third Defendant, it appears, is abroad somewhere, and his agents; the fourth and fifth Defendants, were allowed to defend the suit on his behalf, and, as they were dissatisfied with the decision of the lower Court, they were allowed to make this appeal on his behalf. In the oral pleadings, the *Vakeel* on behalf of the third Defendant, stated that the *Tirupassur Muttah* was purchased by his client in 1852, from the first Defendant, and that a Bill of Sale was executed in his (the third Defendant's) favour, and the transfer of the *Muttah* to his name, and his possession and enjoyment of the property, conferred on him every title, and that the absence of the title deeds of the property was immaterial. The Civil Judge, however, considers that the third Defendant, by his own showing, neglected to observe even the common precautions which are used when property is purchased and sold, for he admits he did not see the title deeds, and it does not appear that he made any regular inquiry as to whether there were, or were not, claims on the property. The Plaintiff, it has been proved, received from the first Defendant, the title deeds of the *Tirupassur Muttah*, in 1851, as security for the delivery of the title deeds of the *Ekattur Muttah*; and, as these title deeds had been so pledged, the first Defendant had no power to effect the sale of the *Tirupassur Muttah*, until he had delivered the title deeds of the *Ekattur Muttah*, and the sale thereof to the third Defendant cannot prevent the Plaintiff from recovering the amount he was forced to pay, to enable him to obtain possession of the title deeds of *Ekattur Muttah*,

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from the property of the *Tirupassur Muttah*, the title deeds of which Plaintiff held as security. The appeal is, therefore, dismissed with costs."

From this decree the third, fourth fifth, and sixth Defendants to the original and supplemental suit, presented a special appeal to the *Sudder Dewanny Adawlut* at *Madras*, upon the following grounds:—Under cl. 1, sec. 4, Act, No. XVI. of 1853; first that the Plaintiff had no lien on the *Tirupassur Muttah*; secondly, that the third and sixth Defendants were respectively purchasers for valuable consideration, without notice, and with registry of the conveyances to them; thirdly, that neither the Principal *Sudder Ameen*, nor the Civil Judge, had any jurisdiction as against the third, fourth, fifth, and sixth Defendants. And under cl. 4, of the same Act, first, that the third Defendant was never served with notice to appear or answer, and that the prosecution of the suit in his absence was wholly illegal; and secondly, that making the fourth and fifth parties was also illegal; lastly, that no points were recorded for the third, fourth, fifth, and sixth Defendants, or any of them.

The *Sudder Court* admitted the special appeal, in order to decide whether the sixth Defendant was to be considered a *bond fide* purchaser without notice, and if so, whether the property purchased by him was affected by the Plaintiff's asserted lien thereon.

The special appeal was heard before Messrs. Hooper, Strange, and Phillips, the Judges of the *Sudder Dewanny Court*, and, on the 23rd of July, 1859, the following decree was made:—"The Courts below have held, that the circumstances of the case give the Plaintiff a lien on the *Tirupassur Muttah* for the money overpaid by him on account of the *Ekattur Muttah*, and that the

omission of the third Defendant to inquire, as he was in duty bound, for the title deeds of the *Tirupassur Muttah*, when making purchase of that *Muttah*, serves to charge him constructively with notice of the Plaintiff's claim. In these opinions we cannot coincide. We consider the above doctrine of constructive notice inapplicable to the circumstances of the country, where, very commonly, old deeds connected with land do not exist, and inquiry for them ordinarily is not made. In the present instance, the third Defendant found the parties with whom he dealt in possession with their names on the registry, and it appears to the Court reasonable that he should have looked for no further proof of title in them, to sell the property to him. In like manner the sixth Defendant found the third Defendant in possession with his name on the registry, and was justified in concluding that he might safely make the purchase from him. The Court hold, therefore, that neither the third nor the sixth Defendant is chargeable with notice, and that the *Tirupassur Muttah*, after passing to their hands, cannot be liable for any lien thereon which Plaintiff may have possessed. The Court is further of opinion, that the Plaintiff possessed no such lien. On the premises stated by him, he might have insisted on specific performance of the engagement of the first and second Defendants to sell him the *Muttah*, but this he has not done. On the contrary, he shows that he has receded from that arrangement by demanding back money which might have been taken as advanced towards completion of the purchase, and represents this money as an over payment made on account of the *Ekattur Muttah*. Now, it is clear, that the deposit with him of the

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title deeds of the *Tirupassur Muttah* was not made with the end of holding that *Muttah* liable in hypothecation for payments made in connection with the *Ekattur Muttah*: it was a deposit without contemplation of mortgage, and the Court hold, therefore, that no lien was created. The Court, for the above reasons, resolve to amend the decrees of the Courts below, so far as to declare that the *Muttah* of *Tirupassur* is not liable for the Plaintiff's demand upon the first and second Defendants. The costs of the Defendants, from three to six, are to be paid by the Plaintiff."

After an unsuccessful application to the *Sudder* Court for review of judgment, the Appellant, as the amount at issue was under the appealable value, applied by petition to the Privy Council, and was allowed, in the circumstances, special leave to appeal.

As the Respondents did not appear, the appeal was heard *ex parte*.

Mr. Teed, Q. C., and Mr. Cracknell, for the Appellant,

Submitted, that the decree of the *Sudder* Court could not be sustained, and in support of the appeal relied upon these grounds:—

First, that as the only point open to the Respondents, under the order of the *Sudder* Court of the 20th of January, 1859, admitting the special appeal, was, whether the Respondent, the sixth Defendant in the original suit, was to be considered a *bona fide* purchaser, without notice, of the *Muttah* of *Tirupassur*, and if so, whether that *Muttah*, as having been purchased by him, was thereby freed from the Appellant's claim upon it; it was, therefore, not

informality, and want of compliance with the provisions of *Ben. Reg. XX.* of 1795, in carrying the sale out. .

The sale took place under the following circumstances:—

The *Talooka* was formerly the property of the *Rajah Ramdial Singh*, the Appellant's grandfather, who being in arrear with the Government, was obliged, in order to save the estate from sale, to borrow a considerable sum of money from one *Petumber Mookerjee*, upon bond security, and *Petumber Mookerjee* not being able to obtain payment either from him during his lifetime, or his son, *Rajah Surnam Singh*, upon whom on his death the *Raj* descended, in the year 1822, instituted a suit against the latter, to enforce his security, and on the 26th of *May*, 1830, obtained a decree in that suit for Rs. 18,700. 15a. 9p. principal and interest, the arrears then due. His next step, was to apply for execution, which he accordingly did on the 25th *August*, in the same year; but he was prevented from obtaining it by *Surrubjeet Singh*, *Sher Mongul Singh*, and *Ruchpal Singh*, brothers of *Surnam Singh*, instituting a suit, in which they claimed, as *Surnam Singh's* brothers, to exempt three-fourths of the *Talooka*, as being their property, from liability to the decree, whereby an Order was obtained, on the 14th of *December*, 1830, postponing any award of execution beyond the one-fourth of *Surnam Singh's* share, until the final decision of that suit.

The effect of this, and other devices of the *Rajah* for delay, was to induce the decree-holder on the 19th of *April*, 1833, to agree to accept the sum of Rs. 16,000, in full, by certain instalments, provided that such instalments were regularly paid, and a

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deed of compromise of that date was accordingly executed to carry out this agreement. Nothing was paid under this deed; and when, in the year 1835, the *Zillah* Court of *Founpore* decided, that the three-fourths claimed by *Surnam Singh's* brothers were equally liable with the remaining one-fourth to the ancestor's debt, an appeal to the *Sudder Dewanny* Court was preferred, creating further delay, and which appeal was not decided until the year 1841, when that Court negatived the claim on the part of *Surrubjeet Singh* and his brothers, and expressed their conviction that the suit was merely collusive, and instituted for the purpose of delaying the decree-holder in his execution. Pending this appeal, *Petumber Mookerjee* proposed to a Mr. *Barwise* to sell the decree to him, and *Barwise*, with the *Rajah's* consent, became the purchaser, paid *Petumber Mookerjee* the full consideration, and took from him an assignment of the decree, dated the 4th of *April*, 1837. Shortly after this, *Surnam Singh* died, and was succeeded in the *Raj* by the Appellant; and *Barwise*, being unable to obtain from him any satisfactory arrangement for payment of the amount due, in *November*, 1837, petitioned the *Zillah* Court for execution of the decree. This petition the Appellant opposed, and it was not until the 4th of *May*, 1843, that *Barwise* was able to obtain an effective order for the realization of the amount due under the decree of 1830.

In the course of these proceedings *Barwise*, on the 4th of *April*, 1840, obtained an Order for execution of the decree (afterwards rescinded on appeal), by which a sale was fixed to take place on the 30th of *July* in

that year; to thwart which the following plan was resorted to by the Appellant. A sum of Rs. 7,000, Government revenue was withheld, in order that if the Collector let the *Talooka* to farm to obtain payment of the arrears, the *Rajah* might get the lease taken by some dependent of his own; and the Appellant contrived to get the 16th of July, 1840, fixed for the letting, in order that the lease might precede the execution sale, and thus interpose a five years' term in the decree-holder's title and leave him with a reversion to sell. This plan was defeated by an Order of the Civil Court, which directed that if it should become necessary to lease the *Talooka* for the arrears, the decree-holder was the person entitled to the lease; and at a later date, in 1843, the revenue being then in arrear, and *Barwise* having paid the arrears, a lease of the *Talooka* for ten years was granted to him.

Immediately after the passing of the Order of the 4th of May, 1843, by which execution was awarded, *Barwise* proceeded to put it in force by applying on the 31st of that month, to the Civil Court of *Founpore* for a sale of the *Talooka* by public auction, through the Collector of *Founpore*, with the consent of the Commissioner of the *Benares* division; finding with his petition the particulars of his claim, and a schedule describing the property as the *Talooka Bazaar Rajah*, paying a revenue of Rs. 19,406. 11a. 6p. In this statement the number of *Mousahs* was reckoned as forty-three, which number included the hamlets with the villages, as it was not until a subsequent adjustment that the hamlets were reckoned separately, which made the number of *Mousahs* sixty-three, the

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number sold and sought to be recovered, the *jumma* and area, however, remaining the same.

Upon this petition the Court submitted to the Commissioner of the *Benares* division the usual formal application for sale under sec. 16, *Ben. Reg.* XXVI. of 1803, and sec. 2, *Reg. XX.* of 1795.

This application the Commissioner, on the 16 of *June* 1843, forwarded to the Collector, who, on the 18th of *July*, fixed the sale for the 21st of *August*, and issued the usual advertisement, and forwarding information of the above, together with a statement of the lands required to be sold to the Commissioner. This statement contained the description—" *Talooka Bazaar Rajah*," area "14,996 *beegahs*," and *jumma* Rs. 19,406. 11a. 6p., and made no mention of the number of *Mousahs*; and on the receipt of it the Commissioner, on the 21st *July*, 1843, forwarded his sanction of the sale to the Collector.

After various delays the sale was proceeded with; the decree-holder bidding to the extent of his demand, but one *Sheopershad* bidding higher, the estate was knocked down to him. *Sheopershad* was, it afterwards appeared, the Appellant's treasurer, sent by him for the purpose of bidding, and thus to delay the sale; and as the deposit-money required was only Rs. 500, he forfeited that sum, and was not to be found when the sale was to be completed; consequently, a fresh sale became necessary, which was fixed for the 13th of *March*, 1844. At this sale one *Pritheepal Singh* became the supposed purchaser at Rs. 47,000; but as no greater earnest than Rs. 500, was required (notwithstanding *Barwise's* requests to that effect), *Pritheepal Singh*, who was also a creature of the

Appellant's, like *Sheopershad*, could not be found to complete, and a third sale was fixed for the 15th of May, 1844; on which occasion, one *Pohip Singh* another fictitious purchaser brought the *Talooka* at a lac of rupees, and who absconded in like manner when the completion of the purchase became necessary.

*Barwise* then requested that at any future sale an earnest of 15 per cent., according to section 2, *Ben. Reg. XII. of 1796*, should be required, but without any immediate effect, as the same course as on the previous sales was adopted, with the same result, on the 29th of July, 1844, the next day fixed for sale, when the estate was knocked down to *Ram Pershad*, who paid the deposit, Rs. 500; but he could not be found when the balance was required.

Two fresh days of sale were fixed for the 27th of September and the 8th of October, but the notices were in each case irregular; and on the irregularities being pointed out by *Barwise*, the sale was ultimately fixed for the 15th of November, 1842. Before this last date the *Sudder Board of Revenue* passed an order requiring the purchaser to pay a deposit of 15th per cent. on the amount of the purchase-money, instead of the earnest being limited to Rs. 500, as before; and that requisition was accordingly put in force at the sale (the fifth attempted sale by *Barwise*). After *Barwise* had bid Rs. 48,100, *Nimkoo Singh*, a low caste *Kolee*, having bid Rs. 48,500, contrived, by a trick upon the Collector, to get away without paying down the deposit; the result of which was, a new sale became necessary, and it was ordered that on such sale, which was fixed for the 24th of December, 1844, the Collector should demand proof from the bidders of their trustworthiness and ability to purchase.

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In consequence of *Barwise's* determination to persist in the sale, the Appellant and *Surrubjeet Singh* so conducted themselves as to lead him to anticipate some attempt at violence on their part, and on the 14th of *August*, 1844, an order was issued upon his application for their arrest, for the purpose of their being held to bail. This order was, however, evaded, and, on the 15th of *December* in that year *Barwise* was murdered. The Appellant was arrested, but acquitted by the *Nizamut Adawlut*.

*Barwise's* executors then interfered, and after further delay, the Collector, on the 7th of *June*, 1845, ordered a fresh notification of sale to be given, by which the sale was fixed for the 15th of *July* then next, and on that day the sale, which is the one complained of in this suit, was effected.

No fresh sanction of the Commissioner of the *Benares* division was obtained, that of the 16th of *June*, 1843, not having been in any way modified or affected, it being considered sufficient for the purpose.

At this sale *Hawes & Gibbons* (*Barwise's* executors) first bid Rs. 48,000; upon which the artifices which had been so effectual on former occasions to delay the sale were again resorted to by the Appellant, and one *Hunooman Pershaud*, a labourer, and one of his dependents, who resided in *Oude*, out of the jurisdiction, made a bid of Rs. 49,000. Upon inquiry by the Collector, it appeared that he had no earnest money with him; but he said that his servant was waiting with it. He admitted that he was in service, and said that he made the offer on the part of one *Ram Dass*, but had no power of attorney or other authority to produce from him. The Collector then proceeded to take other bids, and *Shundur Lall* was

the next person who offered himself, and who professed to bid Rs. 50,000, on behalf of *Sheo Lal*, who also lived in *Oude*; but *Shunkur Lall* had no power of attorney or guarantee of any kind, nor did he make any offer of the earnest-money, or appear in any way prepared with it. The Collector then made further inquiries of the first bidder, but his answers were unsatisfactory, and the Collector being of opinion that these biddings were, like the biddings on former sales, mere fraudulent contrivances to defeat the execution, concluded the sale with *Hawes & Gibbons*, at their bid of Rs. 48,000, which was the only *band fide* one at the sale, and on the 21st of July, 1845, this sale was approved of by the Commissioner of the *Benares* division.

On the 30th of July, the Appellant presented a petition complaining of the sale; but the only irregularity he alleged was the refusal of the Collector to accept the bids of *Hunooman Pershaud* and *Shunkur Lall*.

The *Talooka* was afterwards, on the 12th of November, 1847, sold by *Barwise's* executors, to *Rughobar Sing* on behalf of his son, *Ramnath*, for Rs. 92,500, and by him subsequently sold to the Respondent, *Kishanund Misr*, who had been in possession for nine years, when the plaint was filed by the Appellant, in the Civil Court of *Zilla Founpore*, against him and *Rugobar Dyal Sing*.

The plaint sought the reversal of the sale on the ground of irregularity. The plaint stated that the suit was brought to recover possession of the *Talooka*, by cancelment of the auction sale, on the ground of the irregularity and informality of the sale effected by the Collector in execution of the decree,

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and for the ejection of the Défendants, the successors of the auction purchasers, whose possession rested on, as it was alleged, an illegal basis, and to recover Rs. 17,721. 4a. 1p., as mesne profits, calculated from the date of the expiration of the government lease or farm, viz. from the 18th of *September*, 1853, inclusive. The plaint then stated the principal facts before set out and submitted to the Court the two general heads, on which it was contended that the Appellant was entitled to a decree to set aside the auction sale. These were, first, that the original process of execution of the decree and the order of the Civil Court, directing the auction sale in question of the Appellant's family estate were irregular; and secondly, that the Officers who respectively ordered and conducted the sale committed gross irregularities in effecting the same, and the plaint set out in detail these alleged irregularities.

The answers upheld the validity of the sale and objected to the suit for want of parties.

The Principal *Sudder Ameen* (*Moulvee Mohmmud Hubeebvolla Khan*), by his judgment, pronounced on the 23rd of *February*, 1855, overruled the Défendants' objection to the regularity of the suit, and decreed in the Appellant's favour, ordering the cancelment of the auction sale and setting aside the deeds of sale to the Respondent.

Against this decision the Respondents appealed to the *Sudder Dewanny Adawlut*, North West Provinces, and on the 10th of *May*, 1856, the *Sudder Court*, consisting of Messrs. *Begbie*, *Harington*, and *Unwin*, unanimously reversed the *Zillah Court's* decision. The *Sudder Court* by their judgment held that the sale was valid under the letter of sanction by the Revenue Com-

missioner,\* and that though perhaps it might have been more regular, and more agreeable to established usage, if on the renewal for application for execution of the decree, a fresh application to the Commissioner had been made, under the provisions of cl. 4, *Ben. Reg. VII.* of 1825, but that it was quite clear, that the present Appellant had not sustained any injury by the alleged irregularity, nor had he urged any plea to that effect; and that such being the case, the Court could not admit that it afforded any sufficient ground for the annulment of the sale, and dismissed the Appellant's suit with costs.

The present appeal was brought from this decree, and was argued by

The Solicitor-General (Sir *R. Palmer*), and Mr. *Leith*, for the Appellant, and

Mr. *Forsyth*, Q. C., and Mr. W. *Field*, for the Respondents.

On the part of the Appellant it was submitted that the sale was void by *Ben. Reg. XX.* of 1795, sec. 3, as the sanction of the Board of Revenue was not obtained; that the letter of sanction of the Commissioner of the 21st of *July* 1843, relied upon by the *Sudder* Court, was restricted in terms to the sale then proposed and specifically referred to, which took place on the 21st of *August*, 1843, and that being restricted and qualified, it did not legally authorize the Collector to issue notification for another sale to take place on the 15th of *July*, 1845, embracing other *Mauzahs*, which sale was directed in a summary suit for execution of the decree: and that such sale, therefore, ought to be declared void on the grounds, first, that the proceedings of the Principal *Sudder Ameen*, as well as

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of the Collector which preceded, were irregular; and secondly, that the conduct of the Collector at the sale in refusing to receive biddings, except upon deposit, was contrary to usage in regard to auction sales made in satisfaction of decrees. Further, that the estate was sold for an inadequate price. And lastly, that the delay for nine years to bring the suit for annulment of the sale was no legal bar to the suit under the Regulations of Limitation of suits.

For the Respondent it was contended, that the question of sale of the 15th of *July*, 1845, was not liable to reversal on any of the grounds urged by the Appellant, and that the *onus* was upon him to establish the alleged irregularities which he had failed to do; and, moreover, that the lapse of time from the Respondents' possession, and the institution of the suit, was an answer to the claim for rescinding the auction sale.

Judgment was delivered by

The Right Hon. Sir JOHN T. COLERIDGE.

This is an appeal from a decree of the *Sudder Dewanny Adawlut* at *Agra*, which reversed a decree of the Civil Court of *Zillah Jounpore*, in favour of the Appellant. The suit in which these decrees were made respectively on the 23rd of *February*, 1855, and the 10th of *May*, 1856, was brought by the Appellant to recover back possession of an estate, called the *Talooka Bazaar Rajah, Pergunnah Gudwarree*, which had been the property of his father, *Rajah Surnam Sing*, and which had been sold in execution of a decree obtained by one *Petumber Mookerjee* in *May*, 1830, in a suit first instituted by him in 1822

for the recovery of a debt. One *Barwise* in 1837, had become by purchase the holder of this decree; and the Respondents claimed by purchase for a valuable consideration, and through mesne conveyances, from his representatives, who had been purchasers at the sale held in execution of the decree. The claim in the present suit, was rested not upon any supposed miscarriage in the determination of the original suit, nor any defect in the title of *Barwise* to the benefit of the decree, but on certain alleged informalities and defects in the course of executing that decree, and the sale under it.

In order to understand the questions now raised, a short statement of the material facts will be necessary.

It will be observed that the litigation commenced in 1822; and that the decree in favour of the original Plaintiff was obtained in 1830; seven years were then passed in fruitless attempts by him to carry it into effect; his hopes or his means becoming exhausted, he was induced, for a valuable consideration, to make over this decree to an Englishman of the name of *Barwise*, who, being in the service of the Government, it was supposed probably by both parties, might be more successful in defeating the various devices by which its execution had been up to that time prevented. It is immaterial to the decision of this case whether he purchased on too favourable terms, or succeeded in obtaining too great advantages. It may have been so—on that we pronounce no opinion. It was not, however, until the 6th of June, 1845, and after he had been murdered, as alleged, by the Appellant, that his representatives obtained the Order from the *Zillah* Court of *Founpore*, on which the sale actually took place, the validity of which is questioned in the present appeal.

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We propose now to examine the objections to this sale, advertizing only, as we proceed, to the previous circumstances, so far as may be necessary for the understanding and disposing of these objections. The order for this sale is dated *June 6, 1845.* and is as follows: - "This case was brought up this day It was found from the report of the *Moonshee* of execution of decrees, that Rs. 48,522. 0a. 1p., the total estimated value of the claim, composed of Rs. 46,856 14a., entered in the report of the 22nd *November, 1844,* and Rs. 1,664. 11a. on account of present interest up to the 22nd *May, 1845,* and 8 annas for costs, is quite correct. As it appears from the accounts to be right and proper that *Talooka Baazar Rajah,* embracing sixty-three original and dependent villages, be sold to realise the amount above specified, it is therefore, ordered that a copy of this proceeding be sent to the Collector of the *Zillah,* to apprise him of the above-mentioned facts, in order that the said Collector, after the issue of the second notification, may put up to sale the aforesaid estate, the property of the Defendant the debtor, for the sum claimed as above, and afterwards inform this Court of the result."

It will be observed that this Order dealt directly with the Collector of the *Zillah,* and is silent as to the Board of Revenue. This, it is said, is in breach of the Regulations on this matter, then in force, of Regulation XX. of 1795, which directs that, when any Court of Civil Judicature shall have occasion to sell lands in satisfaction of a decree, it shall transmit a copy thereof to the Board of Revenue, which is, with all practicable dispatch, to cause the lands to be disposed of at the Presidency, or in the District in which the lands are situated, as they may deem most advantageous to the proprietor. The objec-

tion founded on the apparent non-compliance with this Regulation was taken, both in the *Zillah* and *Sudder* Courts, in this suit; and overruled by both—and, their Lordships think, quite properly. It appears that, when a former order for sale had been made by the same Court in 1843, this Regulation had been fully complied with; that the Commissioner had authorized the sale of the whole *Tallooka*; that as many as four sales had taken place, ineffectual and nominal only because the best bidders on each occasion were men of straw, who had, no doubt, been put forward for the very purpose of rendering the decree abortive. It is said that the order directing these former sales must be considered as having been made in a different suit from that in which the order now in question was made, for that the proceedings had been taken off the file, and the lands to be sold and the sums to be recovered were different in the two orders. There is no foundation for either of these assertions. It would be contrary to general principles, and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit. Nor is it true, in any material sense, that either the properties to be sold or the sums to be recovered were different; in both, the same whole *Talooka*, rendering to the Government the same *jumma*, was directed to be sold, and for the same principal sum; but the number of villages comprised in it, owing to some inaccuracy, was differently stated, and the total

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sum was increased in the later order by adding the interest which had accrued, due in the interval between the two, with a few *annas* for the costs. The principal object of the Regulation in question was the security of the public revenue, as appears not merely from its own preamble, but by the modifications which were made in it by Regulation VII., of 1825, tit. ii; and this object had been fully answered by the Communication to the Commissioner in 1843, and the proceedings which were taken by him upon it. If this, therefore, had been a question raised between the original parties to the suit, and if the objection had been made promptly after the sale had taken place, their Lordships would still have been of opinion that it had received its proper answer in the Courts below; but it must never be forgotten that they are now called upon to give effect to it as against a purchaser for a valuable consideration, and, so far as appears, entirely without notice, in a suit commenced in *July*, 1854, the disputed sale having taken place in *July*, 1845. What safety could there be, except by the Statute of Limitations, for any man's title, where a judicial sale had taken place, if he were bound to satisfy himself of the decree-holder's compliance with every one of the many formalities prescribed by law for the conduct of it. This is a remark which their Lordships must bear in mind in considering the objection to which they now pass.

The next objection to be noticed is, the alleged want of due notification of the time and place of sale. At the time when this sale was to take place, this matter was regulated by Regulation XX., section 12, of 1795, which requires notices to be affixed one month before the day of sale in the Court Room of the *Dewanny* or *Zillah*, the Collector's office in the prin-

cipal town or village, and in the office of the Secretary of the Revenue. Now, if it be taken that the burden of proof in respect of these notices can be properly cast on the Respondent, it certainly does not appear to their Lordships that in respect of all of them it is clearly made out that they were duly given; but they are of opinion, that it cannot be so cast, considering how he claims, at what distance of time the objection is made, and the extreme difficulty, if not impossibility, of satisfactorily proving a fact of this nature under such circumstances as are before them. In this country it is in many cases required by Statute, that notices should be affixed on the walls or doors, of Courts, or in other specified places, and for certain specified times, in order to give jurisdiction to Magistrates, to do certain acts which are speedily to follow. In such cases there is no injustice in calling upon the party who moves the Magistrates to exercise their statutory jurisdiction, to prove that these requirements have been complied with. But it would be monstrous to make the title to land in a purchaser depend, years after it has accrued, and possession has been enjoyed under it, on his proving the same affirmatively. In the nature of the thing all traces of the evidence may be expected, as to some of the particulars, "to perish in a short time; in others, where the document ought in strictness to be filed, it is but too common for the Officer, whose duty it would be to file it, to be neglectful.

Their Lordships are of opinion, therefore, that the *onus* lay upon the Appellant, and that he has not discharged himself of it.

It was said, in regard of another objection, and

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might be said in regard of this, that at the time in question he was in prison on the charge of murder; and that was so: but it is clear that he at least knew of the time fixed for the sale, and was able to apply to the Court, because he presented a petition on the 14th of July 1845, to the Zillah Court for its postponement for two months, which was heard and rejected by the *Sudder Ameen* of that Court.

The remaining objection is to the manner in which the sale was conducted. It will be remembered that on several preceding occasions, when sales were attempted, the highest bidders had turned out to be unable, or unwilling, to complete them, and so they had been rendered illusory; the Collector, therefore, had been very properly cautioned to satisfy himself of the trustworthiness of a bidder, before he concluded the sale in his favour. On the present occasion, after the representatives of Mr. *Barwise* had bid a sum of Rs. 48,000, being a little below the amount of the decree, one *Hunnooman Pershaud* bid Rs. 49,000. The Collector asked if he was prepared with the deposit money; he was not. He was asked who and what he was: he said he was a servant, and was bidding for *Ram Das*, of *Sultanpore*. He was asked whether he held a *Mookhtarnamah* from *Ram Das*, and he said he did not. On this he was rejected as a bidder. Thereupon one *Shunker Lall* bid Rs. 50,000, and he was questioned as *Hunnooman Pershaud* had been. It does not appear whether he answered that he was prepared with the deposit or not, but he stated that he was bidding for one *Sheo Lall*, a Banker of *Dostpoor*. Like the former bidder, he had no *Mookhtarnamah*. The Collector rejected both their

biddings; and there being no other bidder, knocked the estate down to the representatives of *Barwise* for Rs. 48,000.

Both *Narain Singh* and these two persons, but not either *Ram Das* or *Sheo Lall*, petitioned the Court against this proceeding of the Collector. It was urged that a production of the deposit ought not to have been insisted on before the estate had been knocked down, and that the effect of the proceeding was to deter bidders, and so diminish the amount for which the estate was sold. Certainly the payment of the deposit could not be required before the acceptance of the bidding, and the knocking down of the estate; but the Collector was bound, in their Lordships' opinion, to satisfy himself reasonably that these persons were, what they professed to be, real bidders, and the course which he took for that purpose was perfectly justifiable; and so it was held in the Court below—their Lordships think quite correctly: they see not the least reason for believing, that it was calculated to deter persons really wishing to buy from offering their biddings, or in any way to damp the sale. It might be unusual: but the circumstances were unusual; as practices had been suffered before in this case, which had made the sales under the Order of the Court mere mockeries, available only for the purpose of defeating the course of justice; the Collector, forewarned, was bound to take care that this sale should be a reality, which it could not be, unless care was taken to distinguish between real and sham biddings. The result shows that his conclusions were correct: if there were such persons as *Ram Das* or *Sheo Lall*, or if either of them had, however irregularly, deputed *Hunnoonman Pershaud* or *Shunker*

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*Lall* to bid for them, we may be quite certain that claims would have been made on their behalf by way of petition to the Court. It is said that the estate was sold for less than its value. It may have been; it was certainly sold, some time afterwards, at a great advance by the purchasers: but considering the character of the previous attempts to sell, and all the previous circumstances of the litigation, this is not to be wondered at. As a fact in itself, it is immaterial to the decision of the case: it is enough that the sale was a real one, conducted justly and regularly.

Their Lordships, in a judgment necessarily so long, have thought it right to take no notice of several matters, important in themselves, but not effecting their decision; they have now disposed of the various points relevant to that decision, and which were urged by the learned Counsel for the Appellant with their usual zeal and ability; but they cannot pass from this case without the expression of their surprise and deep regret, that such a case should have been possible under the system of jurisprudence prevailing in any country under the British dominion.

“ ———— *pudet hæc opprobria nobis,  
Et dici potuisse et non potuisse refelli.* ”

The subject-matter of the original suit a debt, it should seem undisputed, or at least as to which, in substance, no serious dispute was possible, where the Plaintiff's difficulty had not been to establish his right to the judgment of the Court in which he sued, but to make that judgment available when obtained, though the funds were ample for the purpose. By fraud and chicanery, by every possible abuse of the forms and procedure of law, by force and violence,

even, it is to be greatly feared, to the shedding of blood, justice was evaded and defied for fifteen years, from 1830, when the decree was pronounced, to 1845, when the final sale took place. The original Plaintiff, wearied out with the long delay and expense, fain to sell the benefit of his decree; the unhappy man who had been substituted for him losing his life, while vainly striving to realize its fruits. And now, in 1862, their Lordships have been called on to dispose of a suit, in which it is sought to invalidate the whole proceeding as against a purchaser for value, the second in succession from the execution creditor, against whom, or the party from whom he immediately purchased, no fraud, no collusion, no knowledge of the supposed defects in the title, has been alleged. They have had to deal with a record of nearly three hundred pages in folio, setting out more than three hundred documents and depositions. Their Lordships do not intend hastily to cast censure on any individuals; the materials are not before them for that purpose, nor is it within their province to do so: but it is useful to point out that a system under which all this is possible loudly called for amendment, and, administered as it here has been, defeated the very object for which it was instituted.

They will humbly recommend to Her Majesty that this appeal ought to be dismissed, with costs.

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RAMASAWMY AIYAN and others ... *Appellants*,

AND

VENKATA ACHARI and others ... *Respondents*.\*

*On appeal from the Sudder Dewanny Adawlut at Madras.*

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4th Feb.,  
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Suit by the representatives of the *Arya* Brahmins, claiming in hereditary right, the *Mirassi* and exclusive privilege of administering *Purohitam* (religious rites and ceremonies) to seventeen classes of pilgrims who resort to the shrine of the great *Pagoda* and other Temples in the Island of *Rameswaram* in *Madras*, dismissed; the Plaintiffs failing to establish their

right, either (1) by documentary proof of its origin, or (2) by proof of such long and uninterrupted usage as, in the absence of documentary proof, would suffice to establish a prescriptive right.

THE Appellants were *Arya* Brahmins settled at *Rameswaram*, an Island in the district of the Presidency of *Madras*, and claimed to have the hereditary right of administering *Purohitam*, or religious rites, to seventeen classes of pilgrims who resort to the great *Pagoda* and other temples in that Island, and to the fees paid, or presents offered, by the pilgrims resorting to the shrine. The Respondents were members of a sect or body of Brahmins, known as the *Parishai Bhattars*, who also administered the *Purohitam*, and had done so for many years, and who claimed the right from long usage, and were in the receipt of the income derived from the fees paid by the pilgrims resorting to that

\* Present : Members of the *Judicial Committee*.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

*Assessors*.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Island : with the exception of a small portion for the performance of certain inferior duties in the *Pagoda*, which the Appellants were, as it was alleged, on account of their origin alone competent to perform.

In the year 1849, the Appellants, twenty-seven in number, filed a plaint in the subordinate Court of *Madura*, against the Respondents, fifteen in number, to recover the rents alleged to be due to them, in respect of fees so received by the Respondents for six classes of pilgrims under a *Swamuhogam*, or annual rent deed, dated as far back as the year 1786, and for eleven other classes, seeking by the suit to be established in the enjoyment of all these rights. The plaint set forth the grounds of the claim, and the title under which the Plaintiffs claimed, and the loss incurred in connection with the *Mirassi* privilege of administering *Purohitam* to pilgrims, and prayed that the *Arya Mahajanam* should enjoy, without the interference of the Defendants (the Respondents), the *Mirassi* of administering *Purohitam* to eleven classes of pilgrims, capable, as alleged, of yielding an annual income of Rs. 1,000, and which formed part of the *Mirassi* originally forcibly seized and then enjoyed by the Defendants : the plaint further prayed that the Defendants should continue to pay annually to the *Arya Mahajanam*, Brahmins of the *Arya* sect, and to the body of *Gurukals*, a community belonging to that sect, pons Rs. 100, or Rs. 126. 12a. 11p., being the amount of rent fixed on the *Mirassi* for administering *Purohitam* to the six classes of pilgrims, other than the eleven aforesaid, which were then in the enjoyment of the Defendants as therein detailed ; and

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that, in default of the Defendants so paying it, the Plaintiffs and others should enjoy without the interference of the Defendants, the *Mirassi* of administering *Purohitam* to such six classes, capable as alleged of yielding an annual income of Rs. 600. The plaint set forth, first, that from the time the *Pagoda* of *Rameswaram* came into existence, the *Mirassi* of administering *Purohitam* to all classes of pilgrims resorting to *Rameswaram* had belonged to the whole community of the *Arya* Brahmins. That while this privilege had been enjoyed by their ancestors, the *Mirassi* of administering *Purohitam* to the *Siva Devijas* and six other classes of pilgrims had been taken for *Swanubhogam*, or annual rent, by *Sahasranama Dikshitar* and *Ullitars* who were the ancestors of *Ramanadha Aiyar* and others, officiating as *Adhyena Bhattars* in the *Pagoda* of *Rameswaram*, from the ancestors of the *Arya Mahajanam* aforesaid, under a document passed one hundred and seventy-five years ago, stipulating an annual payment of *pons* 50. Secondly, that with regard to the *Mirassi* of administering *Purohitam* to the *Tadwadi* Brahmins, and nine other classes of pilgrims, besides the seven classes therein mentioned, it had been conferred a long time ago by the ancestors of the *Arya* Brahmins as *Sridhana* upon the community of the *Gurukals*. That while the Plaintiffs and *Arya Mahajanam* continued in the enjoyment of the income derived from the exercise of the *Mirassi* to the seven classes aforesaid, and also to the other pilgrims, about thirty years previous to the execution of the deed of rent thereafter referred to *Sasha Aiyar*, *Sonne Bhattan Parvata Bhattan*, *Krishnaya Bhattan Srinivassa Bhattan*, and *Giri*

*Bhattan* (*Tatwadi* and *Telugu* Brahmins, who had removed from *Manamadurai* to *Rameswaram*, and were the ancestors of the Defendants), engaged to administer *Purohitam* to six out of the ten classes, namely, the *Tatwadi* Brahmins, the *Tamil* Brahmins and *Telugu* Brahmins of the *Khon* country, the *Kanaris* Brahmins, the *Northern* Brahmins, the *Aradhya* Brahmins, and the *Telugu* Brahmins; on condition of paying to the community of the *Gurukals* two out of ten per cent. of the income derived therefrom. That this state of things continued for a few years, when a dispute arose between the *Gurukals* and *Sesha Aiyan*, in regard thereto. Thirdly, that both parties having laid the matter before the then *Zemindar* of *Ramnad*, that *Zemindar* convened a body of arbitrators, who decided that *Sesha Aiyan* should, in co-operation with the agents of the community of the *Gurukals* belonging to *Arya Mahajanam*, administer *Purohitam* to six classes of pilgrims, and that twenty per cent. should, as before, be paid to the community of the *Gurukals*: that all the *Tatwadi* and *Telugu* Brahmins of *Manamadurai* had executed a "*Parisha Tiriva Chit*" (or deed of rent for administering *Purohitam* to pilgrims), in favour of the whole community of the *Gurukals*, belonging to *Arya Mahajanam*, and that the other five above mentioned had executed a document under date of the 9th *Vayasi Parabhava*, which passed one hundred and four years ago. Fourthly, that while that document remained in force, one *Timmana Achari*, the great-grandfather of one of the Defendants, who was a member of the Brahmins of *Manamadurai*, suppressed the incomes derived

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from the *Purohitam* administered to six classes of pilgrims, without fairly accounting for them, notwithstanding that *Raghanadha Gurukal* and others, members of the community of the *Gurukals*, remonstrated against the performance of the *Purohitam* by them. That *Timmana Achari* executed an agreement in favour of *Raghanadha Gurukal*, and other members of the community of the *Gurukals* representing the *Arya Mahajanam*, under date the 1st *Chitra Chitrabhanu* (11th April, 1822), to the effect that, instead of paying two out of ten, or twenty per cent, he should enjoy the incomes derived from the performance of *Purohitam* for the six classes of pilgrims, on condition of paying, on that account, an annual rent of *pons* 100, in default of which the community of the *Gurukals* themselves might resume and enjoy the performance of *Purohitam* for the aforesaid six classes. That such rent was paid to the community of *Gurukals*, up to the year 1825. Fifthly, that afterwards, the father of the first Defendant, and others, brought an action in the District *Moonsiff's* Court of *Paramagoody*, asserting, among other allegations, that they were the proprietors of the *Mirassi* of administering *Purohitam* to twenty-four classes of pilgrims, including also the six classes; that *Annasami Vadhiyar* and three others, having, in the year *Parthiva* (1826), administered *Purohitam* to *Sengendi Parishie*, one of the twenty-four classes of pilgrims, appropriated to themselves the incomes derived therefrom. That thereupon *Chinnasami Aiyar* and another, members of the *Arya Mahajanam*, presented an objecting petition, which they substantiated, alleging to the effect, that

the *Mirassi* of administering *Purohitam* to all the classes of pilgrims including the twenty-four classes, belonged to them, and *Arya Mahajanam* alone, and not at all to the *Parishai Battawars*—i.e., the Brahmins of *Māhmadurai*; and that a decree was passed by the *Moonsiff* in that suit holding that the privileges aforesaid belonged to the present Plaintiffs and *Arya Mahajanam*, and they had the enjoyment accordingly. That this decree was confirmed in appeal, by the late *Zillah* Court, who observed that the Plaintiffs, in, that suit—i.e., the father of the first Defendant in this suit, and others—were agents of *Arya Mahajanam*; and that no special appeal was preferred against such decree. Sixthly, that the Defendants, and other *Parishai Battawars* had, from the time of their ancestors, dwelt on the grounds belonging to the *Pagoda* of *Rameswaram*, and continued to pay an annual quit-rent of *pons* 60, together with 6 *pons* for charges. That in a deed of gift executed by *Vijaya Raghanadha Setupati*, a late *Zemindar* of *Ramnad*, in favour of the *Pagoda* at *Rameswaram*, it was provided, that the *pons* 66 should be appropriated to "*Sukravarakuttalai*," or "Friday services," of the *Pagoda*; and that the ancestors of the Defendants paid likewise an annual tax of *pons* 24, for the festival of *Gangalanadha Swāmi* in the *Pagoda*. That this tax, together with the aforesaid *pons* 66, amounting in all to *pons* 90, was paid by the *Parishai Battawars*, to the *Pagoda*, up to the year 1825; but that afterwards, the payments having fallen into arrear for seven or eight years, the fact was brought before the late Principal Collector, Mr. *Blackburn*, who

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sent for the Defendants and directed them to pay the money as usual. Seventhly, that the Defendants falsely represented that the *Mirassi* of administering *Purohitam* to twenty-five classes of pilgrims belonged to them; that seventeen out of them remained in their unmolested enjoyment; but that in regard to the remaining eight classes of pilgrims, there had been a dispute between them and *Arya Mahajanam*, and a delay in the payment of the aforesaid *pons* 90. That the Collector, supposing the representations of the Defendants to be true; without, as it was alleged, conducting a proper examination, passed a decision, under date the 25th of *February*, 1835, to the effect, that the *Parishai Bhattars* should enjoy the *Purohitam* of twenty-one classes, made up of four out of the aforesaid eight classes, and the seventeen classes above referred to; and, that with regard to the *Purohitam* of the other classes of pilgrims, it should be enjoyed by *Arya Mahajanam*, who, however, forthwith represented to the Collector, by means of an *Arzi*, that the decision was unjust in declaring that the *Mirassi* administering *Purohitam* to all classes of pilgrims belonged to the Defendants, and that they did not agree to it. That while this inquiry was going on the Defendants, arrogating the right to the *Purohitam*, on the strength of the above decision of the Collector, and subsequent to an engagement entered into by one *Ramalinga Aiyar*, a resident of *Rameswaram*, under date the 12th *Chitra Manmadha* (23rd *April*, 1835), agreeing to pay a rent of *pons* 61 for the pilgrims of *Karvatuand Reddi* class to the Plaintiffs and other members of the *Arya Ma-*

*hajanam*, who formed a part of the *Parishai Bat-tamars*—fraudulently administered *Purohitam* to the aforesaid two classes of pilgrims, and appropriated to themselves the income derived therefrom. Eighthly, that six out of the aforesaid twenty-one classes pertained to the rent above referred to; and four were out of the seven classes taken by the *Adhyena Bhattars* for *Swamubhogam* rent. That the *Purohitam Mirassi* of these eleven classes, ought to be put into the possession of the *Arya Mahajanam*. Ninthly, that *Perya Nayanar*, *Ramaswami Aiyans*, and three other members of the *Arya Mahajanam*, had instituted a suit, No. 117 of 1835, on the file of the late *Zillah Court*, representing the history of their title, and praying for the recovery of *Purohitam* of the above-mentioned twenty-one classes of pilgrims, and the loss incurred in connection therewith; but that the Court dismissed the suit, observing, among other circumstances, that as it appeared upon the face of the plaint itself that there were others entitled to the *Purohitam Mirassi*, the suit ought to have been brought in conjunction with them; and that that decree was confirmed on appeal, No. 17 of 1840, preferred to the Provincial Court for the Southern Division. That as the original and appealed decrees aforesaid decided that certain other members of *Arya Mahajanam* should have joined in bringing the suit, No. 117, the Plaintiffs had not preferred a special appeal from the decree in the appeal suit No. 17, intending to bring an original action, inasmuch as the right of the *Arya Mahajanam* was confirmed in the year 1826, by certain original and appeal decrees, which had become final. Tenthly,

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that with the fraudulent view of preventing the interference of the *Arya Mahajanam* and their people, with the *Mirassi* of administering *Purohitam* to the aforesaid twenty-one classes of pilgrims, the Defendants, owing to their influence with the Revenue officials, procured the issue of repeated, though unjust, orders, and consequently continued to enjoy the *Mirassi* forcibly. That since the year 1835, when the *Adhyena Bhattars* had been deprived of their enjoyment of the *Mirassi* of administering *Purohitam* to the aforesaid four classes, and the *Arya Mahajanam* of their right to the *Purohitam* of the aforesaid eleven classes of pilgrims, there had been a dispute about them ever since; and the plaint prayed for a decree, adjudging the Defendants (the Respondents) to pay Rs. 2,916. 10a. 8p., the loss of income derivable from the exercise of *Purohitam Mirassi* to the six classes, for twenty-three years, from the year 1826 to 1848, at *pons* 100 per annum; and also Rs. 4,400, the loss of income derivable from the other eleven classes of pilgrims from the year 1845 to 1848, at Rs. 100, for each class of pilgrims per annum, in all Rs. 7,316. 10a. 8p., and for a declaration that the *Purohitam Mirassi* attaching to the above classes of pilgrims, yielding annually Rs. 1,000, should be enjoyed by the Plaintiffs and other members of the *Arya Mahajanam* without the interference of the Defendants; that the Defendants might be directed regularly to pay to the Plaintiffs and other *Arya Mahajanam*, and the community of *Gurukals*, the fixed rent of Rs. 126. 12a. 11p. annually, otherwise that the *Purohitam Mirassi* of the above six classes of pilgrims, yielding annually Rs. 600, should

be enjoyed by the Plaintiffs and other members of the *Arya Mahajanam* and the community of *Gurukals* without the interference of the Defendants.

The Subordinate Judge of *Madura*, on the 12th of June, 1842, rejected this plaint, as inadmissible. The Subordinate Judge, in his judgment, being of opinion, that the same question had been decided by the *Zillah* Court, in the suit, No. 215 of 1835, referred to in the plaint, and confirmed on appeal, by the late Southern Provincial Court, in No. 17, of 1840.

The Appellants appealed to the Civil Judge of *Madura* from this decision, and that Judge, on the 7th of November, 1849, expressed a similar opinion.

The Appellants then appealed to the *Sudder* Court at *Madras*, and that Court by an Order, dated the 20th of November, 1851, after observing, that it appeared that the suit, No. 232 of 1826, was filed before the District *Moonsiff* of *Paramagoody*, for recovery of Rs. 126. 7a. 5p., as Priests' emoluments due from one out of the several classes of pilgrims frequenting *Rameswaram*; and that the *Moonsiff* decided that the right to this class belonged, not to the Plaintiffs, but to the *Arya* Brahmins; and that this decree was confirmed on appeal No. 183 of 1826, of the late *Zillah* Court of *Madura*; and that the suit No. 117 of 1835, of the late *Zillah* Court was brought by four of the *Arya* Brahmins, who asserted themselves to have right over all the twenty-four classes of pilgrims, but sued for emoluments only in respect of the four; the sums sued for being Rs. 94. 14a 3p. and Rs. 200, and that the *Zillah* Court went into the whole question of the *Arya* Brahmins' rights, and allowed them to have none; that this was confirmed on appeal by the Southern Provincial Court

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in No. 17 of 1840; that the plaint in question was brought by twenty-seven of the *Arya Brahmins*, and was for Rs. 7,316. 10s 8p. as loss incurred by evasion of their rights; and also, to gain possession of right over eleven classes of pilgrims, yielding Rs. 1,100, annually, to confirm the *Aryas* generally in their rights, and and conside from Defendants annually Rs. 126. 12s. 11p. The rent for six classes held by them, or to recover possession of the said six classes, the total value of the suit being Rs. 9,016. 10s. 8p.; that in the suit No. 117, the *Zillah* Court went beyond the matter brought under litigation before them, and the decree of that Court could not be considered as disposing of the general claims of the *Aryas*. That it was admitted in the decree, that all the *Aryas* were not represented in the suit; neither did the suit, in its subject, or its valuation, comprehend the matter of all their asserted rights. And the Court finally declared that a suit to bring the question of these rights to an issue might yet be laid; and that no bar to the reception of the plaint existed, which the Court accordingly directed to be received; and finally ordered, that the plaint should have been admitted on the file.

The plaint was accordingly filed, and contained the same allegations as the plaint of 1849 (a).

The Respondents by their answer, denied that the Appellants, or the other *Arya Mahajanam*, had any right to the *Purohitam Mirassi*, claiming title to it themselves under a grant from *Mavalivana Rajah*, dated about 1,000 years previously. The Respondents also relied upon the decree in the suit No. 117, of

(a) See *ante*, P. 345.

1835, as a bar to the Appellants' claim; but they did not specifically plead the Regulations of limitation of suits as a defence thereto.

The suit being at issue, the Judge of the Subordinate Court of *Madura*, on the 6th of *May*, 1853, directed that the following point should be proved by the Appellants; first, their hereditary and exclusive title and right, as well as that of the other *Arya* Brahmins, to perform the service as *Prohithars* or administerers of rites to the people of all classes frequenting *Ramaswaram* as pilgrims, and their ancestors' enjoyment accordingly. Second, that ten classes were granted to the ancestors of the Plaintiffs, twenty-one to twenty-seven, as *Gurukalman Saleyars*, and that the Defendants' ancestors had since rented from them the six classes as specified in the second paragraph of the plaint, engaging to pay them annually 2-10ths of the emoluments thereof, under a written agreement which had been acted under. Third, that under a document the first Defendant's great-grandfather subsequently obtained these same six classes from the above-named *Gurukalmans Saleyars* upon an annual rent of 100 *pons*, and that such was actually paid up to 1825. Fourth, that the Defendants took illegal possession of eleven other classes as described in the eighth paragraph of the plaint, from the year 1835, and that with the exception of these and the four classes obtained by *Adhyena Bhaters*, all other classes were under the enjoyment of the Plaintiffs and the other *Arya* Brahmins; and the Defendants' enjoyment of emolument equivalent to the loss claimed. That the Respondents were also to prove, first, that the litigated right to perform the *Purohita*;} ser-

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vice to all classes of people belonged to them and other *Parishai Bhattars* exclusively, and that the *Arya* Brahmins had no title thereto, and that such Brahmins settled at *Ramaswaram* posterior to *Thundaver*. Second, that in accordance with their right, they paid originally an annual *Porapad* tax amounting to 160 *pons* to the *Zemindar*, as fixed by him, and that they, with his consent and authority, subsequently paid 100 *pons* annually to the *Gurukalman Salejars* for their maintenance.

Both parties having entered into evidence the cause came on to be heard (together with an objecting petition which had been presented by four other persons claiming title to the emoluments arising from certain classes of pilgrims) before Mr. A. W. Phillips, the acting subordinate Judge. The decree of that Court, dated the 4th of *November*, 1854, after stating the evidence in the cause, was in these terms : " The proceedings and documents connected with this case are most voluminous, and much that is introduced is totally foreign to the subject, which, divested of all extraneous matter, consists, after all, of only two points to be decided on, first, as, to whom the proprietary right of administering certain rites belongs. Secondly, whether the six classes were rented by the Plaintiffs' ancestors to those of the Defendants, or not. The *Aryas* (Plaintiffs) claim the hereditary right to the *Mirassi* of administering certain religious ceremonies to all classes of Hindoos resorting to the shrine at *Ramaswaram*, and, in asserting that they have been unjustly deprived of their right, bring forward no less than twenty-four documents, of one sort & another, to prove the validity of their claim,

and to show that the privilege of administering the ceremonies to six of these classes was rented to the Defendants' ancestors by their own, on certain specified terms. The Defendants, on the other hand, deny ~~in toto the~~ hereditary right to be that of the Plaintiffs, and produce documents to back their assertions, declaring at the same time that they, and they only, are the proprietors of the whole, and as such, never could have rented the six classes as stated by their adversaries. The hereditary right of the Plaintiffs has been not only acknowledged, but proclaimed by the individual recognized by all classes of Hindoos (Brahmins included) as their head and High Priest. It has also been acknowledged by Brahmins, not parties to or interested in any way in this suit. The *Zemindar* of *Ramnad*, as appears from other documents, acknowledges the same, and directs the *Aryas* to perform the ceremonies with regard to himself. Several letters are also produced, showing that *Maharajah Kistnabhoyee Holkar* has been in the regular habit of sending down the sacred water of the *Ganges* and other offerings, and, as the recognized and lawful Priests attached to the shrine in question, the *Aryas* were forbidden by the late *Zillah* Court of *Ramnad* to be taxed by the *Zemindar*. A separate document shows, that accordingly the *Aryas* did not pay the tax. Other proofs, too numerous to detail, are produced, all showing, in the plainest possible manner, that the right of the Plaintiffs was generally acknowledged. The Defendants, on their part, appear entirely to fail in establishing their claim by any satisfactory evidence whatever; indeed, the few documents they do produce tended rather to

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strengthen the claims of their adversaries than their own. The Court feels no hesitation in declaring 'its opinion, that the Plaintiffs have fully and satisfactorily proved their proprietary right to the whole *Mirassi*. In support of the other question to be determined, namely, the renting of six classes from the Plaintiffs, and to show that they were rented to the Defendants' ancestors by those of the Plaintiffs, two documents were produced. The first of these is a deed executed by the Defendants' ancestors to the *Gurukalman Saleyars (Aryas)* about one hundred and twenty-four years ago, engaging to pay the *Aryas* twenty per cent. upon the income derived from six classes, which they, the Defendants' ancestors, rented of the Plaintiffs. The second is another document executed by the Defendants' ancestors some years subsequent, cancelling the former agreement and engaging to pay in lieu of any per-centage on the receipts derived from the six classes (and which it appears led to dissensions) an annual fixed rent of 100 *pons* or Rs. 208. In return to these undeniable proofs, of not only the proprietorship of the *Mirassi* belonging to Plaintiffs, but of the six classes being rented to the Defendants' ancestors, the Defendants produce documents with the intention of proving that they are the owners of the *Mirassi*; but anything more crushing to their own case could not have been brought forward, as the plainly show that 100 *pons* were annually paid to the *Gurukalman Saleyars*, and tally precisely with what Plaintiffs asserted; and the attempt to show that it was paid by order of the *Zemindar*, and was a tax levied by him on the *Mirassi*, having entirely failed, the Court is of

opinion, that the second point also, as well as the first, is established in Plaintiff's favour. The hereditary right of the Plaintiffs to the whole *Mirassi* right being established, and it having been shown to the Court's satisfaction that the six classes were rented to the Defendants' ancestors on certain terms, it decrees that Defendants do continue to pay the stipulated rent from 1849, or deliver the six classes and all income derivable therefrom to the Plaintiffs as the rightful owners. It also decrees, that the Plaintiffs are entitled to the other eleven classes, and to all arrears of income as claimed from 1826 to 1848. All costs of suit to be borne by the Defendants."

The Respondents appealed from this decree to the Civil Court of *Madura*.

The appeal came on for hearing in the Civil Court of *Madura* on the 29th of June, 1857, when the Judge, Mr *C. E. Baynes*, after stating the proceedings in the suit, observed that—"The *Sudder* Court having overruled the objections taken by the Court below to the entertainment of the suit, as involving a question already finally decided against the Plaintiffs (Respondents), the Civil Judge had only to point to the proceedings of that Court, under date the 20th of November, 1851, as precluding him from taking into consideration the Appellants' first objection ; " and, after stating his dissatisfaction with the documents produced by the Appellants (the original Defendants) to which his attention was called by the second objection, and that he could not draw the same conclusive inferences as the Subordinate Judge had done : and that, with the whole subject, before him, on the appeal, he was of opinion, that the evidence adduced did

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not warrant the original decree; he proceeded thus:—"The *Aryas* found on a grant by *Stree Rama*, which certainly is not proved; the *Parishais* on a grant by *Mavalivana Rajah*, which is equally destitute of proof. In short, there is nothing on which to rest a judgment, save the apparent and notorious facts of the case, undeniable by either party, namely, that there is a Holy shrine at *Rameswaram*, to which pilgrims resort. *Aryas*, *Parishai Bhattars*, and *Gurukals* have been worshipping at it, and dwelling in its vicinity from times not only beyond all memory, but all history. Both *Aryas* and *Parishais* have been officiating as *Prohitodus*, or ministering guides to pilgrims, each of late years at all events, claiming a monopoly, and saying the other had not right to do so. The *Parishais*, it appears, are said to have, out of their profits, come under engagement or order to pay a certain sum annually to the *Gurukals*; if so, and they fail, the parties entitled have their remedy; but for declaring that either the *Aryas* or *Parishais* have any exclusive right to act as *Prohitodus* to all, or any of the pilgrim classes, there appears to be no evidence or ground whatever, or for awarding any damages to either party. The original decree is, therefore, reversed, and it is declared, that both *Aryas* and *Aarishai Bhattars* have a clear prescriptive right, and are both competent to act as ministering guides, or *Prohithars*, to any pilgrims who may choose to employ them as such. This recognition of their common right, while it is all to which the evidence adduced on either side appears to entitle them, is all which in the opinion of the Civil Judge could be awarded

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to them, without infringing on the rights and liberties of third parties, who have hitherto apparently received little consideration in this case, namely, the pilgrims. I doubt if the Court would have any power to parcel out the Hindoo community as a flock of sheep between these rival shearers; and it is evident that the establishment of a legal monopoly in either of them would consign the flock to their mercy. It is necessary that the right of choice should be reserved to the pilgrims. All any minister can ask the Court to pronounce is, that there is nothing to prevent the exercise of his functions towards any party willing to employ him. Under the circumstances of this case, the Civil Judge considers that it would be equitable that each party pay their own costs in the original suit and appeal."

The Appellants appealed from this decision to the *Sudder Dewanny Adawlut* at *Madras*, when the Respondents for the first time set up as a defence, that the suit was barred by the Regulations of Limitation.

The appeal came on to be heard by the *Sudder* Court on the 30th of *October*, 1858, when that Court, consisting of Messrs. *Morehead*, *Hooper*, and *Strange*, before proceeding on the merits of the case, called upon the Appellants' Pleaders to show cause, why the suit should not be at once dismissed as being barred by the Regulations of Limitation, on the ground, that the cause of action in the case of the arrears of payments on account of the six classes having arisen in 1826, from which time the Plaintiff stated that no payments had been made, and in the case of the eleven classes in 1828, at which time the Plaintiffs in bring-



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ing a similar suit had acknowledged that the right of administering to these classes was vested in the Defendants.

After hearing the Pleaders on that point, the Court pronounced the following judgment :—“The Plaintiffs and the Defendants are of rival sects, and severally claim the privilege of administering the *Purohitam* to the classes of pilgrims resorting to *Ramaswaram*. These classes are represented to amount to twenty-five in number; but the suit is laid for compensation as regards seventeen only thereof. These rival sects have already been in repeated litigation; but it is only necessary to refer to the matter appearing in the last suit preceding the present one, which has arisen between them. This is the appeal No. 17 of 1840, on the file of the late Provincial Court for the Southern Division. From the decrees given in that suit, it appears, that the Collector undertook the adjustment of the dispute between these sects; that pending his decision, the pilgrims were left to select to which of the two they would resort; that this state of things subsisted for seven or eight years; that afterwards the Collector, on proceeding to arbitrate in the matter, found that the Plaintiffs’ side conceded to the Defendants the privilege as respected seventeen of the classes of pilgrims, and that the contest between them related only to the remaining eight; and that he thereupon awarded four of these to the Plaintiffs’ sect and four to the Defendants’. It further appears, that the above suit, No. 17 of 1840, which was instituted by certain of the Plaintiffs’ sect, was in regard to the privilege over the four classes allotted

by the 'Collector to the Defendants' sect; and that the present suit is in regard to the seventeen classes excluded from the Collector's decision, as not then being in disputation. The Court thus find that the rights now contended for by the Plaintiffs have been in abeyance to their sect from about the year 1828, or from seven or eight years previous to the Collector's aforesaid decision; and that the claim is consequently barred by the Regulations of Limitation. The Plaintiff's Pleaders being unable to advance anything to relieve them from the above position, the Court resolved to dismiss this suit, and require the Plaintiffs to pay all the costs thereof."

The appeal was from this decree and was argued by

Mr. *Rolt*, Q. C., and Mr. *Cracknell*, for the Appellants, and

The Solicitor-General (Sir *R. Palmer*) and Mr. *Millar*, for the Respondents.

The Appellants in support of the appeal relied upon the following grounds,—

First, that the objection that the suit was barred by the *Mad.* Reg. II. of 1802, sec. 18, upon which the decree of the *Sudder* Court was alone founded was not open to the Respondents, the same not having been pleaded by them, nor raised in any manner until the appeal to that Court.

Second, that, as to the Appellants' claim to an annual rent of Rs. 126. 12a. 11p. for the six classes mentioned in the proceedings, the Respondents were not at liberty to raise objections founded upon any

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Regulation or rule as to limitation of actions, they being in the position of tenants in possession, under the Appellants as landlords, or owners.

Third, that, even if any such defence were open to the Respondents, there was no Regulation, or rule of limitation of actions or suits, applicable to the case, so as to bar the Appellants' right to maintain the suit.

Fourth, that the decision of the *Sudder* Court was inconsistent with and opposed to the decision of that Court on the 20th *November*, 1851, in directing that the Appellants' plaint should be received and prosecuted.

Fifth, that, upon the merits of the case, the Appellant's claim was fully substantiated by the evidence in the cause, and was not barred or affected by the decrees made in the suit No. 117 of 1835, relied upon by the Respondents; that suit being between different parties and for a different subject matter, the decision in it, so far as it affected the matters in question in the present suit, being extra-judicial and ineffective to bind the Appellants.

Sixth, that the decision of the Judge of the Civil Court of *Madura* was founded upon a mistaken construction and a misconception of the effect of the documentary evidence, and was otherwise contrary to law, and to the usage of many ages, which had the effect and force of law.

Lastly, that the Judge of the Civil Court of *Madura*, had omitted to decide upon the Appellants' claim to the arrears and future payments of the annual sum of *pons* 100, or Rs. 126. 12a. 11p., claimed as or in the nature of rent from the Respondents.

The Respondents contended that the decree appealed from was right, by reason—

First, that the Appellants' suit was barred by the law of limitation.

Secondly, that the Appellants' suit was barred by the decrees made in the original suit, No. 117, of 1835, and upon appeal.

Thirdly, that even if the Appellants' suit was not barred by those decrees, yet that the decrees were decisions upon the merits made, *in pari materia*, and ought to be followed, and

Lastly, that the Appellants upon their own admissions, and upon the evidence in the suit, had not made or proved any case to the exclusive privileges claimed, upon which a decree could be made in their favour.

Judgment was reserved, and now delivered by

The Right Hon. The Lord Justice KNIGHT BRUCE :

The subject of litigation in this case is the right of administering what is called "*Purohitam*" to seventeen classes or castes of the numerous pilgrims who resort to the great *Pagoda* and other temples in the Island of *Ramaswaram*.

The Appellants, the Plaintiffs in this suit, sue, and the Respondents are sued, as representatives of the bodies to which they respectively belong. Whilst, however, the Respondents are all members of a homogeneous class, described indifferently as *Tadwadi* and *Telegu* Brahmins, or as *Parishai Bhattars*, resident in and about *Ramaswaram*; the Appellants are some of them *Arya* Brahmins, and other *Gurukals*: the differences between these two latter classes, their

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rights and privileges, being some of the matters involved in the question at issue in this suit.

The case put forward by the Appellants is shortly this: they assert that ever since the first foundation of the *Pagoda*, an event which they ascribe to a very remote age, the *Arya* Brahmins possessed the privilege, and that an exclusive privilege, of administering *Purohitam* to all classes of pilgrims resorting to *Ramaswaram*. They treat, however, this privilege as alienable, or at least capable of delegation; and state that by an instrument bearing a date, which it is now agreed corresponds with A. D. 1765, the *Arya* Brahmins have, in consideration of an annual payment of 50 *pons*, transferred to a community called the *Adhyena Bhattars*, the privilege of administering *Purohitam* to seven specified classes of pilgrims; and in some way or another, and at some uncertain but distant date, have conferred the same privilege over ten other classes of pilgrims upon the community of the *Gurukals*. They further state, that the *Gurukals* again transferred the privilege as to six of those ten classes to the body represented by the Respondents, which it will be convenient to distinguish as *Parishai Bhattars*, on the condition that the latter would account to them for twenty\* per cent. of the emoluments derived from the exercise of the right; that a dispute having arisen between these two last-named bodies, an arbitration took place A.D. 1736, which resulted in the execution of an instrument, and that difficulties having subsequently occurred in carrying that arrangement into effect, the payment of twenty per cent. on the collections was commuted for a fixed annuity of 100 *pons*, which, by an agree-

ment, dated the 11th *April*, 1822, called a deed of rent of pilgrims, dated the 9th *Vyasi Parabhava* (19th *May*, 1786), executed by the ancestors of the Defendants to the community of *Gurukals*, in which they agreed to pay Two *pons* out of every ten *pons* realized by them out of six classes of pilgrims, the *Parishai Bhatters*, some time about A.D. 1762, agreed to pay, and did in fact pay up to the year 1825, to the *Gurukals*. The Appellants' plaint, after stating these facts, notices the proceedings in a suit, No. 232 of 1826, in the *Moonsiff's* Court, the effect of which their Lordships will consider when they come to deal with the evidence. It also states the effect of a copper-plate grant passed by the late *Zemindar* of *Ramnad* in 1794, by which, in A.D. 1714, the then *Zemindar* of *Ramnad* granted certain dues payable to him by the *Parishai Bhatters*, and amounting to 90 *pons*, to a particular goddess in the *Pagoda* on account of the Friday services. It also states some proceedings before the Collector in 1835, when that officer endeavoured to compose the strife which had long existed between these rival sects of Brahmins, by an order which, as appears from the decision of the Collector itself, affirmed the rights of the *Parishai Bhatters*, to administer *Purohitam* to twenty-one classes of pilgrims, subject to the payment into the *Pagoda* of 190 *pons* annually; being the 90 *pons* for the Friday services, and the 100 *pons* payable to the *Gurukals*. This order assumed that the right of the *Parishai Bhatters* as to seventeen of their classes was not in dispute, and it left either party, if dissatisfied with it, to bring a civil suit. The plaint then shortly notices the proceedings in a

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suit of 1835, which was brought by some of the *Arya* Brahmins against some of the *Parishai Bhattars* in respect of two of the classes comprised in the Collector's order, and was dismissed by a decree of the *Zillah* Judge, dated the 27th of June, 1840; a decree confirmed on appeal by the Provincial Court on the 28th of December, 1841. It then explains that the claim in the present suit is limited to seventeen of the twenty-one classes comprised in the Collector's order, because the remaining four belong to the *Adheyena Bhattars* under the deed of 1695; and further, that whilst the claim as to eleven of the seventeen classes is general, as to the remaining six, which were the subject of the instruments of 1726 and 1762, it is limited to the enforcement of the rights of the *Gurukals* under the latest of these documents. The particular relief prayed, is a decree for the payment of Rs. 2,916. 10s. 8p., being the arrears for twenty-three years of the annuity of 100 *pons* payable to the *Gurukals* in respect of the six classes; of Rs. 4,400, by way of damages incurred in respect of the other eleven classes; for a declaration that the *Purohitam Mirassi* of the eleven classes is henceforth to be enjoyed by the *Arya* Brahmins, without the interference of the *Parishai Bhattars*; and for an order that the *Parishai Bhattars* do regularly pay the 100 *pons* to the Appellants and the other *Aryas*, and the *Gurukals*, or otherwise that the *Mirassi* as to these classes also is to be enjoyed by the Appellants and other members of the *Arya Mahajanum*, and the community of the *Gurukals*, without the interference of the *Parishai Bhattars*.

The case set up by the Respondents in opposition

to that of the Appellants is, that their ancestors were established in the place or neighbourhood, and invested with the privilege of administering *Purohitam* to pilgrims resorting to *Ramaswaram*, by a certain *Rajah*, about 1,000 years ago; that they afterwards from generation to generation enjoyed this privilege, and the emoluments resulting from its exercise, and so acquired the title of *Parishai Bhatters*; that the *Zemindars* of *Ramnad* imposed an annual tax upon them of 160 *pons* payable out of their receipts, which they continued to pay until the time of one *Vijaya Raghunadha*, who granted 100 out of the 160 *pons* to the community of the *Gurukals* on their complaint of having no income in the *Pagoda*, and afterwards granted the remaining 60, with some other dues payable by the *Parishai Bhatters* (making 90 *pons* in all), for the Friday services of the *Pagoda*.

They treat the latter grant as made by the copper-plate deed of 1714; but do not show in what precise form or by what instrument the first was made; and assert that after 1714, the whole of the 190 *pons* was paid into the *Pagoda*. They state that in 1827, there was an attempt to settle the disputes between their community and that of the *Arya* Brahmins by a native *Panchayat* (the failure of which is much to be regretted); that afterwards, in the course of an inquiry before the Sub-Collector, the *Aryas* admitted that, in respect of seventeen classes, there was no dispute as to the right of the *Parishai Bhatters*, and that the Collector's order of 1835 was made on that admission. They further insist strongly upon the decrees in the suit of 1835 as a bar to the present suit, which they also contend is barred by the Regulation of Limitation.

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The issues settled in this suit (a) threw upon the Appellants the burden of proving, first, the hereditary and exclusive right of the *Arya* Brahmins to administer *Purohitam* to all classes of people frequenting *Ramaswaram* as pilgrims, and their ancestors' enjoyment accordingly; secondly, the grant, as alleged, of the ten classes to the *Gurukals*, and that the *Parishai Bhattars* had since rented from the *Gurukals* six of the ten classes, undertaking to pay them annually two-tenths of the emoluments under a written document which had been acted upon; thirdly, that, under another document, this liability had been commuted for an annual payment of 100 *pons*, and that the latter had been paid up to £1825; and, fourthly, that the Defendants had taken illegal possession of the eleven other classes, and that with the exception of these and the classes held by the *Adhyena Bhattars* all other classes were enjoyed by the *Arya* Brahmins. The issues which the Respondents were called upon to prove were, first, the alleged right of the *Parishai Bhattars* to perform *Purohitam* to all classes, that the *Arya* Brahmins had no title thereto, and had come to *Ramaswaram* since a particular date; second, that they had originally paid an annual tax of 100 *pons* to the *Zemindar*, and subsequently, with his consent, paid the 100 *pons* annually to the *Gurukals* for their maintenance.

The suit was first heard by the Judge of the Subordinate Court of *Madura*, who, on the 4th of *November*, 1854, made a decree in favour of the Appellants. From this there was an appeal to the Civil Court of *Madura*, and the Judge of that Court on

(a) See *ante*, p. 355.

The 29th of June, 1857, reversed the decree below, and dismissed the suit on the ground that the Appellants had failed to prove the conclusive right which they claimed; but directed each party to pay their own costs. A special appeal was then preferred to the *Sudder Dewanny Adawlut* at *Madras*. That Court on the 30th of October, 1858, dismissed the Appellants' suit with costs, on the ground that their claim was barred by the Regulation of Limitation, the only question which it allowed to be argued before it.

The present appeal is general. It has been argued before this Committee, both upon the merits of the case, and also upon the question whether the suit is effectually barred, either by the decrees in the former suit of 1835, or by lapse of time under the Regulation of Limitation.

Their Lordships propose, in the first instance, to deal with the merits of the case.

The first observation that arises is, that the existence or non-existence of the original and exclusive right to administer *Purohitam* to all classes of pilgrims, which is claimed by the *Arya* Brahmins, is an issue which goes to the whole case. It is true that that part of the claim which consists of the arrears of the annual payment of 100 *pons*, under the instrument of 1762, is founded upon contract. But the contract is one between the *Parishai* Brahmins and the *Gurukals*, and it is difficult to see how the Appellants, suing on behalf of the community of *Arya* Brahmins, can establish any title to relief in respect of this part of the case, unless they prove that the title of the *Gurukals* to these six classes was

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derived, as alleged in the plaint, from the earlier and original title of the *Aryas*, and was so held by the *Gurukals* that the subsequent disposition of these classes must be taken to have been made for the benefit of the *Arya* community, as well as for that of the *Gurukals*.

What, then, are the proofs adduced in support of this first and principal issue ?

The earliest in date consists of extracts from one of the *Puranas*. These, like the statements in the pleadings of the Appellants' case, carry us far beyond the bounds of legal or historical evidence. But it is argued, and fairly and properly argued, that these ancient books may legitimately be used as evidence, that a certain state of facts, or a certain state of opinion, existed at the date of their compilation. That date is sufficiently uncertain; for we are not told when this particular *Purana* is supposed to have been written; and it appears from the writings of eminent Orientalists, that the period during which the eighteen recognized *Puranas* were composed is a very wide one, extending probably from the eighth to the sixteenth century.

Evidence of the Appellants' right, dating even from the latest of these epochs, would of course be most valuable. Their Lordships, however, fail to find in the extracts before them satisfactory proof that at the time when this *Purana* was compiled (whenever that may have been), the *Arya* Brahmins were in the enjoyment of the peculiar and exclusive privilege which is now claimed by their descendants.

There are passages which show that a community known as *Arya* Brahmins then existed at *Ramaswaram*,

and embody the legends concerning the miraculous origin of their ancestors, and their immigration, at the summons of *Rama*, to the southern coast, from their native seat in *Oudh*. Other passages undoubtedly recommend in strong terms the ministrations of the *Arya* Brahmins, and imply that the full spiritual benefits of a pilgrimage are not to be obtained without them. But these do not lead with any certainty to the conclusion that even at that distant period all the pilgrims to *Ramaswaram* in fact resorted to the *Aryas* for *Purohitam*, or were under a positive and well-recognized obligation to do so. The very mode in which the peculiar efficacy of the ministrations of the *Aryas* is pressed leads to the inference that even then there was some variety of practice and opinion in this matter. Part of the *Purana* cited in these proceedings is in the shape of a dialogue; wherein one of the interlocutors begins by expressing his doubts whether *Puja* should be offered through the instrumentality of the *Aryas*, doubts which are of course ultimately removed. Taking the authority of these texts at the highest—and it must be remembered that there is little or no evidence as to their authority—their Lordships cannot find that they do more than enjoin upon pilgrims who wish to have the fullest spiritual benefit of their pilgrimage, the duty and necessity of resorting to the *Aryas* for their offices. They do not show that the duty was universally recognized as imperative, or that the enjoyment of the privilege, as it then existed, was exclusive.

Again, the value of the texts, such as it is, as evidence in support of the Appellants' title, is, in their Lordships' opinion, much diminished by the consider-

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ation that the privilege now claimed is admitted to be capable of alienation or delegation. They would be of far more weight if the case made were that by positive ordinance or by traditionary usage the privilege of administering certain religious rites had become vested in a particular class of priests, so that in the contemplation of all faithful Hindoos the efficacy of the rite must for all time depend on the *status* or character of the ministrant. When the principle of alienation or delegation is admitted, texts to the effect that the efficacy of the rite depends on the character of the ministering priest necessarily lose their force.

Moreover, this quality of the privilege must greatly increase the difficulty of proving its continued enjoyment, supposing that it ever existed. Functions inseparably annexed by the authority of sacred books to a particular order of men will be recognized, preserved, and perpetuated by the religious sentiment of succeeding generations. But the privilege of exercising these functions, when alienable for money, ceases to be the subject of religious sentiment, and becomes mere proprietary right; and every long-continued enjoyment of the privilege by others is of course capable of being ascribed to a presumed grant or alienation of which the direct evidence is lost.

That the present claim of the Appellants is not supported by any general religious feeling or conviction on the part of the Hindoos, whether founded on the texts of the *Puranas* or independent of them, may be inferred from the very nature of the disputes which have continued for so many years. It is clear

that during that long period there has been great diversity of practice and opinion amongst those who resort to the *Pagoda*; that out of the vast concourse of pilgrims from all parts of the *Deccan*, if not of *India*, some have sought for *Purohitam* at the hands of the *Aryas*, others at the hands of the *Parishai Bhatters*, others, again, at the hands of the *Adhyena Bhatters*; probably as they have been moved by considerations of race, language, district, or caste. But we have more particular evidence upon this point in the *Sreemokum* of *Sunkar Acharyar* which was produced in evidence in the suit of 1835, and is referred to in the pleadings of this suit. That document was in the nature of a certificate, from a person described as the High Priest of all the Hindoos of the south of *India*, and was strongly adverse to the claim of the *Aryas*. Mr. *Elliot*, who as Judge of First Instance, decided the suit of 1835, felt it to be of sufficient weight to relieve him from the necessity of pursuing the inquiries which he had directed through Pundits touching the authority of the texts from the *Puranas*. The Appellants themselves, in their pleadings, seem to admit the general authority of *Sunkar Acharyar*, but endeavour to take off the effect of his certificate by telling a not very credible story of his having given it when in a fit of irritation against the *Aryas*. They have also produced, by way of answer to it, Exhibits, consisting of Letters Patent from *Sringeri Sankara Acharyar* to his disciples. It is sufficient, on this part of the case, to observe that the effect of these conflicting documents is at most to leave the question in doubt, and that the Appellants cannot adduce, in support

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of this claim, anything like a clear concurrence of opinion upon the part of those who may be supposed to be at the present time authoritative expounders of the ceremonial law and usages of the Hindoo religion.

We now proceed to consider the effect of the other documentary evidence.

The documents which purport to be the earliest in date, except the *Puranas*, are the deed said to have been executed to the *Aryas* in A.D. 1675 by the *Adhyena Bhattars*; the copper-plate deed produced by the Respondents, dated 1714; the deed said to have been executed by some on behalf of all the *Parishai Bhattars* to the *Gurukals* in 1726; and the subsequent agreement between the various parties, which purports to have been executed in 1762.

The first of these can at most prove that the *Adhyena Bhattars*, who are not parties to this suit, claim under a deed, purporting to be of considerable antiquity, the right of administering *Purohitam* to seven classes of pilgrims, other than the classes which are the subject of this litigation, under a title derived from the *Aryas*. The *Adhyena Bhattars* are said to have been since dispossessed of four of these seven classes by the *Parishai Bhattars*. But whatever may be the merits of that dispute, they are not in question in this suit. This deed can prove nothing here except that in 1675, the *Aryas* claimed the right of disposing of the privilege as to these particular classes of pilgrims, and that the *Adhyena Bhattars* then admitted their title.

The effect of the deeds of 1726 and 1762 (if any) upon the issue which we are now considering, viz., the

original and exclusive right of the *Arya Brahmins* to administer *Purohitam*, is limited to the six classes of pilgrims which are the subject of these instruments. They do not touch the eleven other classes that are in question in this suit.

Their genuineness is questioned by the Respondents, who give an account of the origin of the payment of 100 *pons* that is inconsistent with them. It has been argued that suspicion is cast upon them by the circumstance that no mention is made of them in the proceedings in the suit between the *Gurukals* and the *Aryas* in 1807, although the *Parishai Bhattars* are there stated to possess the privilege of administering *Purohitam* to these six classes, and to be subject to the duty of paying 100 *pons* annually to the *Gurukals*, and that nothing was heard of them until the suit of 1826. It has been further argued that there is no proof of the custody whence they came, or other evidence to support them. Notwithstanding these arguments, their Lordships are disposed to deal with the case as if both these deeds, as well as the copper-plate deed of 1714, were genuine. They think the two former may well stand with the latter.

The copper-plate deed is, upon the face of it, nothing but the grant of certain subjects in favour of the goddess named in the heading of it, "on account of the Friday services." The annual payment of the *Parishai Bhattars* on this account appears on the whole evidence to be limited to 90 *pons*. This instrument, therefore, proves nothing as to the annual payment of 100 *pons* to the *Gurukals*, or its origin. It undoubtedly proves that in A.D. 1714,

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the body which the Respondents represent was known as "*Parishai Bhattars*," a title which implies some connection with pilgrims, and that, as such, they carried on a business which may reasonably be inferred to have been the administration of *Purohitam* to some classes of pilgrims. And even if it be assumed that those classes of pilgrims included the six which are specified in the deeds of 1726 and 1762, that hypothesis is not necessarily inconsistent with these deeds, for the earlier deed does not purport to be the original grant of these classes, or to show how the administration of *Purohitam* to them by the *Parishai Bhattars* began. It recites the existence of a dispute between the *Parishai Bhattars* and the *Gurukals* touching the administration of *Purohitam* (a dispute which may have been of long standing), an appeal to the *Zemindar*, a reference to arbitration, and an award which, whilst it left the administration of the rite to the six classes with the *Parishai Bhattars*, imposed upon them the duty of paying 20 per cent. on their receipts to the *Gurukals*. The two deeds, 1726 and 1762, therefore, are not inconsistent with the copper-plate deed, which the Respondents may be taken to have proved, though they are inconsistent with their allegations touching the origin of the payment of 100 *pons*, which they have failed to prove. From the three documents taken together it follows, that before the year 1726, and possibly before 1714, the *Parishai Bhattars* were in the exercise of the functions involved in the administration of *Purohitam* to some classes of pilgrims, including, or at least extending to, the six classes which were the

subject of the agreement of 1726; but the material question with reference to the issue now under consideration is to what extent that arrangement with the *Gurukals*, and the description of the *Gurukals* in the two deeds as "forming the *Arya Mahajanum*," or "a part of the *Arya Mahajanum*," or "composed of the *Arya Mahajanum*," involve any admission or proof of the general title set up by the Appellants.

The answer to this question will be best supplied by a correct definition of the relation in which the *Gurukals* stood to the *Arya* Brahmins. Their Lordships must reject the statement upon this point which is contained in the fourth paragraph of the appeal petition, as inconsistent with others made by the Appellants in certain stages of the proceedings, and with the evidence in the cause. It was, in fact, almost given up by Mr. *Rolt* in his reply, and treated as a mere argument of the Appellants' Pleaders in answer to an objection taken by the Judge in the Court below.

The most credible account of this *Gurukal* community is probably to be found in the proceedings in the suit of 1807 (the piece of evidence that is next in order of date), since it was given by the *Gurukals* themselves when engaged in litigation with the *Arya* Brahmins, and was then admitted by their opponents to be substantially correct. From that it would appear that the *Gurukals* were *Marattah* Brahmins invested with the office of performing the *puja*, or worship, in the interior of the Temples; that they were appointed by the *Aryas*, and were in the habit of marrying the daughters of *Aryas*; that the office of *Gurukal* was not hereditary, but

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that on the death of any one of them another *Marattah* Brahmin was appointed in his place; that in 1807, the community of *Gurukals* were in the receipt of the 100 *pons* per annum from the *Parishai Bhattars*, and of fees payable in respect of other classes of pilgrims, by whomsoever the rite of *Purohitam* was administered; that the net emoluments of this community were divided amongst the members of it, and each man's share again apportioned between him and the particular *Arya* whose daughter he might have married. The two communities were, therefore, distinct bodies, different in race; and this very suit of 1807, shows that they might have different and conflicting interests. If this be so, the description of the *Gurukals* as "composing," or "composed of," or "forming part of the *Arya Mahajanum*," must be inaccurate, unless these words imply a body in which the two communities, though distinct for some, may coalesce for other purposes. Such an hypothesis is not inconsistent with the literal meaning of the words as it may be gathered from "*Wilson's Dictionary*."

Again, in this suit of 1807, the *Gurukals* seem to have claimed the right of administering *Purohitam* to the six and certain other classes of pilgrims, as a prescriptive right, without admitting any earlier title in the *Aryas*. The *Aryas*, in their answer, seem to set up a joint interest in the emoluments, and speak of a compromise and arrangement effected by a deed, bearing a date which would correspond with 1745, of which there is no proof. Therefore the case made on either side in the suit of 1807 seems to be hardly consistent with that made in the present suit as to the derivation of

the *Gurukals*' title from that of the *Aryas*. And upon this part of the case it appears to their Lordships that it would be unsafe to infer from the deeds of 1726 and 1762, or from any evidence that has yet been considered, either that the *Aryas* have a common interest with the *Gurukals* in the annual payment of 100 *pons*, or that such title as the *Gurukals* may have had in the six classes of pilgrims before the arrangement of 1726 was necessarily derived from the original and exclusive title to all classes of pilgrims which is set up by the *Aryas*. This view of the case is in some degree confirmed by what is called the "*Attachi*" That paper purports to be a representation made in *March*, 1822, when the *Pagoda* was under the management of the Government, officers, by some of the Appellants, to the effect, that the *Parishai Bhattars* have allowed the payment of 90 *pons* and 100 *pons* to fall into arrear. It treats the whole money as payable to the *Pagoda*, and therefore, in the existing circumstances, to the *Circar* or Government, but describes the 100 *pons* as the *masadanum* for the *Sabhayar* or community of *Gurukals*.

The rest of the documentary evidence may be reduced to three heads: the proceedings in the *Moon-siff's* Court in 1826; the proceedings which resulted in Collector's Order of 1835; and the proceedings in the suit of 1835.

The first suit was brought by some *Parishai Bhattars* against some *Aryas*, and it is said to have been collusive. The Plaintiffs in it asserted the title of their body to administer *Purohitam* to twenty-four classes of pilgrims, admitting the duty of paying annually 190 *pons* to the *Pagoda* and the community

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of *Gurukals*. But the immediate subject of the suit was the alleged invasion of this right as to a class called "*Sangita*," which is one of those that were afterwards awarded by the Collector to the *Aryas*. There is no question about that class in this suit. Other *Arya* Brahmins intervened by petition, and set up their general title in the *Moonsiff's* Court. The *Moonsiff* made a decree against a Defendant who had admitted (it is said collusively) the Plaintiff's claim, and dismissed the suit as against the other Defendants. He also intimated an opinion that the suit, if properly framed, should have been brought against the *Arya Mahajanum*, which appeared to have been in the enjoyment of the *Purohitam* of the *Sangita* class. This judgment has been treated as a decision in favour of the *Arya* Brahmins, but it cannot be taken for more than an expression of opinion that they might have a good title as to the class of which they appeared to be in possession.

The chief importance of the proceedings which ended in the Collector's order consists in the admission supposed to have been made before Mr. *Paris*, a subordinate Collector, in the course of a local inquiry made by him in 1829. It is contained in an attested copy of a *Mahratta* document drawn out in 1827. It is referred to, though it is not very accurately described, by the Collector, (in his decision of the 21st of *February*, 1835,) and is the basis of his order. It was produced in the suit of 1835, and was proved to the satisfaction of Mr. *Elliot*, the Judge. He says of it in his judgment. "The *Seristadar*, it appears, wrote down in the presence of the Sub-Collector of *Madura*, from the mouths of the Plaintiffs, that they had no dispute respecting seventeen of

the twenty-five castes, but only for the remaining eight." Mr. *Rolt* argued strongly upon the improbability of the *Aryas* making such an admission so soon after the decision in the *Moonsiff's* Court. It does not, however, cover this *Sangita* class, which alone was the subject of the suit before the *Moonsiff*. And the improbability, such as it is, seems to their Lordships to be outweighed by the consideration that two officers with local experience have, whilst the facts were still recent, treated the document as genuine, and acted upon it. It is, therefore, difficult to suppose that the admission was not made by some at least of the *Arya* community, and it covers fifteen out of the seventeen classes that are the subject of this suit.

The decision of the Collector was almost immediately followed by the suit of 1835. The original Plaintiffs in this were four only of the *Arya* Brahmins. Two of them having died, twenty more members of the community intervened by petition, and seem to have adopted and prosecuted the suit. Its object was limited to the enforcement of the alleged rights of the *Arya* Brahmins as to two only of the classes which are the subject of this suit; but the original title of the community was stated in terms as wide as those in which it is now stated, and was distinctly put in issue. It was, moreover, supported by much the same evidence as that which has been adduced in this suit. The decision, however, of the *Zillah* Judge, confirmed on appeal by the Provincial Court, was that the title was not made out, and the suit was accordingly dismissed.

Their Lordships may dismiss the oral testimony with the observation that it is almost necessarily

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inconclusive. The question is one on which the Hindoo community has for many years been divided. Each witness, as a matter of course, deposes according to the practice, or opinions, or traditions of his own family. Nor will proof of acts done even by so considerable a personage as *Holbar* do more than prove the practice or opinion of a particular family or individual.

Upon the whole it is their Lordships' opinion that the evidence, though it may establish that the *Arya* community has existed as part, and a principal part, of the Hierarchy of this *Pagoda* and its dependencies from a period of remote antiquity, and that the Appellants may be taken to be the actual representatives of that community, fails to show, either by documentary proof of its origin, or by such proof of long and uninterrupted usage as in the absence of a documentary title will suffice to establish a prescriptive right, the existence at any time of the original and exclusive privilege which the Appellants have made the foundation of their title. It also fails to show when and how, if the right ever existed, its enjoyment was first interrupted, and, consequently, leaves it uncertain, whether the interruption was caused by an invasion for which there is now a remedy, or by an actual or presumable act of alienation. It is not proved that the Appellants' community was at any particular time in the actual enjoyment of the privilege of administering *Purahitam* to eleven out of the seventeen classes which are the subject of this suit; whilst there is evidence that the *Parishai Bhattars* for some time anterior to 1835 were in the undisputed enjoyment of this privilege as to nine of these classes, and exercised it,

though subject to dispute, as to the remaining two. Nor is it inconsistent with the evidence in the cause to suppose that this state of things may have existed in or before the year 1714. And if the evidence as to the remaining six classes shows that the *Parishai Bhattars*' undisputed enjoyment of the privilege as to these six classes for nearly one hundred and fifty years has been subject to the payment to the 100 *pons*, under an arrangement which implies an acknowledgment of an earlier title in the *Gurukals*, it falls, as their Lordships have already observed, to establish either that *Aryas* have a common interest with the *Gurukals* in this annual payment, or that the title of the *Gurukals* to these classes was necessarily derived from the still earlier and more general title of the *Aryas*, which the Appellants assert.

The Appellants, therefore, on all points have failed to relieve themselves of that burthen which the necessities of their case, and the particular issues directed in the cause, imposed upon them. Nor is this failure the less fatal to this suit because the Respondents may also have failed to show that they had any exclusive right in the privilege which they enjoy; or because they may be under a liability to the *Gurukals* in respect of the annual payment of 100 *pons*, which may be capable of being enforced in a suit properly framed for that purpose.

Their Lordships, taking this view of the merits of the case, are relieved from the necessity of considering whether either the decrees in the former suit of 1835, or the Regulation of Limitation, present an effectual bar to the suit. They rest their decision on the ground that the Appellants have failed to support their claim by any sufficient evidence.

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Their Lordships, however, are of opinion, that the *Sudder* Court ought not to have limited the argument to the single question of limitation; and that it ought not to have thrown on the Appellants the whole costs of the suit. They think that the decree of the 29th *June*, 1857, sealed and signed on the 1st *August* in that year, was correct in the direction given by it as to the costs up to the latter date, and they will, therefore, humbly advise Her Majesty that the decree of the *Sudder* Court ought to be varied, and to stand and be simply for the dismissal, with costs of the appeal to that Court; the Appellants, however, paying the costs of this appeal.

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THE ADVOCATE-GENERAL of BENGAL }  
 on behalf of Her Majesty ... } *Appellant,*

AND

RANEE SURNOMOYE DOSSEE ... *Respondent.\**

*On appeal from the Supreme Court at Calcutta.*

THE question in this case was, whether the interest of a Hindoo, a British subject, in a fund which was standing to the credit of an account in a cause in the Supreme Court at *Calcutta*, had been forfeited to the Crown, by reason of his having committed suicide in *Calcutta*, and found *felo. de se* by a Coroner's jury there.

The question was raised by a petition presented

\* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Sir. Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

*Assessors*,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

29th & 30th  
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The introduction and establishment of the English Criminal law in *India* and its application to Natives as well as Europeans, considered, in reference to the prerogative of the Crown to forfeiture of personal property of persons committing suicide in *Calcutta*.

The English law of *felo de se*, and forfeiture of goods and chattels, does not extend to a native Hindoo, though a British subject, committing suicide at *Calcutta*.

Where Englishmen establish themselves in an uninhabited, or barbarous country, they carry with them not only the laws, but the Sovereignty of their own State; and those who live amongst them and become members of their community, become partakers of and subject to the same laws.

This rule held not to apply to the early settlement of the English in *India*, as the permission to the settlers to use their own laws within the Factories, did not extend those laws to Natives associated with them within the same limits.

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by the Advocate-General of *Bengal*, on behalf of Her Majesty, for a transfer of this fund to the Crown, on the ground of such alleged forfeiture.

The circumstances which gave rise to the claim were as follow :—

*Rajah Hurrynauth Ray*, a Hindoo, possessing considerable real and personal property in the Province of *Bengal*, made his Will on the 26th of *November*, 1832, and soon afterwards died, leaving his mother, *Ranee Shoosharmohee Dossee*; his wife, *Ranee Hurrosoondery Dossee*; an only son, *Rajah Kistonauth Roy*, and a daughter, *Gobindsoondery Dossee*, him surviving.

On the 28th of *September*, 1839, *Ranee Hurrosoondery* and *Ranee Shoosharmohee* filed a bill, in the Supreme Court at *Calcutta* against *Rajah. Kistonauth Roy* and *James Charles Colebrook Sutherland* (who with *Nathaniel Alexander* was named Executor), setting forth the Will, and praying that the trusts thereof might be carried into effect under the decree of that Court. A cross bill was subsequently filed by *Rajah Kistonauth Roy* against *Ranee Hurrosoondery*, *Ranee Shoosharmohee Dossee*, *James Charles Colebrook Sutherland* and *Nathaniel Alexander*.

On the 29th of *June*, 1843, the Supreme Court directed that out of the money then in Court, to the credit of these causes, a sum of Rs. 6,86,700, should be invested and transferred to a separate account; and that out of the interest thereof Rs. 800 per month should be paid to *Ranee Shoosharmohee Dossee*, and Rs. 1,400 per month to *Ranee Hurrosoondery Dossee* during the term of their respective lives, which was done accordingly. Subject to these charges the fund so set apart belonged to and was part of the estate

of *Rajah Kistonauth Roy* as the only son and general legatee and devisee of the Testator.

On the 31st of *October*, 1844, *Rajah Kistonauth Roy* whose family estates were situate at *Berhampore* in *Bengal*, out of the jurisdiction of the Supreme Court, but who had a residence at *Calcutta*, committed suicide at *Calcutta*. He was a Hindoo by birth and religion, and died childless, leaving the Respondent, his widow, his heiress and representative according to Hindoo law, him surviving.

An inquest was held by the Coroner for the town of *Calcutta*, and an inquisition was returned by the Jury, finding that the deceased died *felo de se*; and that he had at the time of his death, goods and chattels within the town of *Calcutta* to the value, including the fund in the Supreme Court, of Rs. 9,87,063. 3a. 5p., and without the town of *Calcutta*, to the value of Co. Rs. 2,89,500.

On the day on which he committed suicide, the deceased signed a paper-writing purporting to be his Will, whereby, after leaving various legacies, he directed that in the event, which happened, of no son being born to him, the greater part of his *Zemindary* and landed property should go to the foundation of a school or college, which he solicited the British Government of India to establish from the proceeds of it.

Shortly after *Rajah Kistonauth Roy's* death litigation arose concerning this Will. The Respondent alleged that the Will had been executed by *Rajah Kistonauth Roy* while of unsound mind; and its invalidity was declared in a suit in the Supreme Court, to which the British Government in *India* was a party. The Government thereupon gave up to the Respondent

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all the real and personal property of *Rajah Kistonaath Roy* situate out of *Calcutta*, which was at that time in its possession, or under its control, and permitted the Respondent to receive from the Registrar of the Supreme Court, with whom the same had been deposited, pending the result of the suit, all the personal property of *Rajah Kistonaath Roy* situate in *Calcutta*, with the exception of the money standing to the credit of the causes, to the possession of which the '*Rajah*', or his representative, was at that time entitled.

The Respondent was advised by Counsel to take proceedings to set aside the verdict of *felo de se*, as being against the weight of evidence, as well as on the ground of misdirection by the Coroner in his charge to the jury, but no proceedings were taken for that purpose, in consequence of the Government of *India*, or their legal advisers, stating to her legal advisers that they would not prefer any claim under such verdict of *felo de se*.

In the absence of any claim to forfeiture by the Government of *India*, and in accordance with such waiver, the whole of the real estate, and such of the personal estate of the deceased as was not in Court, was absolutely given up to the present Respondent.

*Ranee Shoosharmohee Dossee* died on the 14th of *February*, 1848, and shortly after, the Respondent, as the representative of *Rajah Kistonaath Roy*, made claim to so much of the fund in Court as was not required to meet the sum of Rs. 1,400 per month charged thereon in favour of *Ranee Hurrooondery*; but the Court refused to make any order on such claim, and directed that the same

should stand over pending an application to Her Majesty, on the ground that there had been neither a grant by the Crown, nor any formal intimation on which the Court could act, that the Crown had intended to surrender, or to abstain from urging its right in respect to *Rajah Kistonauth Roy's* estate.

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The Respondent accordingly caused notice of her claim to be served on Her Majesty's Attorney-General, and on the Solicitor of Her Majesty's Treasury in *London*, and also in 1849, to avoid litigation, presented a memorial to Her Majesty praying that Her Majesty would be graciously pleased either to abandon her claim, or to grant the same to the Respondent as *Rajah Kistonauth Roy's* widow.

In addition to these notices and memorial, the proceedings on the Coroner's inquest and the finding thereupon were, immediately after they had taken place, communicated to the Solicitors of Her Majesty's Treasury, in *London*, for instructions, in case Her Majesty should thereupon be advised to prefer any claim to the property of *Rajah Kistonauth Roy*; but no claim was made by the Crown. And, in *August*, 1860, a letter was sent by the Secretary of State for *India* to the Governor-General in Council, stating that the Commissioners of Her Majesty's Treasury waived all claim to the property of the late *Rajah Kistonauth Roy* so far as the interests of the Crown were concerned, and left it to the disposal of the Indian Government.

On the 16th of *January*, 1861, the Advocate-General presented a petition to the Supreme Court, claiming that the fund set apart by the Court, subject to the aforesaid charges, belonged to and was part of

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the estate of *Rajah Kistonauth Roy*, as only-son and general legatee and devisee of the Testator, *Rajah Hurnauth Roy*; and that on the felonious suicide of *Rajah Kistonauth Roy* the right, title, and interest in and to the fund (subject as aforesaid) became forfeited to and was vested in Her Majesty, Her heirs and successors; and the petition prayed, that after retaining so much of the fund as might be required to meet the still subsisting charge of Rs. 1,400, per month, and after paying the costs of that application, the remainder of the fund might be transferred to the Secretary of State for *India* in Council, for and on behalf of Her Majesty, for the purposes of the Government of *India*.

This petition was heard by the Supreme Court on the 19th of *April*, 1861, when judgment was delivered, by the Chief Justice, Sir *Barnes Peacock*. After setting forth the facts above detailed, and stating the origin of the claim and the waiver by Her Majesty's Government in *England* of any claim on account of the alleged forfeiture of the estate of the late *Rajah Kistonauth Roy*, the learned Judge proceeded:—  
 " *Rajah Kistonauth Roy* left a widow, *Ranee Surnomoye Dossee*, his mother, *Ranee Hurosoondery Dossee*, and two nephews, *Opender Chunder Nundy* and *Juggender Chunder Nundy*, the sons of his sister, *Gobindosoondery*. These parties have appeared by their respective Counsel. *Ranee Surnomoye Dossee*, the widow, does not oppose the claim; but it has been contended on behalf of the mother and nephews, that the Crown is not entitled to any portion of the fund, and that according to the law in force in *Calcutta* it was not forfeited. In addition to that, which was the main argument, it was urged on behalf of the mother of

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*Rajah Kistonaath Roy*, that he was never entitled to any part of the fund in Court, and that consequently even admitting, for the sake of argument, that the law of forfeiture prevailed in *Calcutta*, no part of the fund passed to the Crown. The case of *Mussumat Golab Koonwur v. The Collector of Benares* (4 Moore's Ind. App. Cases, p. 246) was cited to show that the forfeiture, even if it existed, could not affect the rights of the mother and widow of *Rajah Hurrynauth Roy* to maintenance. We entirely concur in that view; but we are of opinion that the mother and widow, although entitled to maintenance, were not entitled to the money brought into Court to secure it. It is sufficient for us to state shortly, that in our judgment, *Raja Kistonaath Roy*, at the time of his death, was entitled to the fund; subject to its remaining in Court as a security for the maintenance of the mother and widow of *Raja Hurrynauth Roy* until their respective deaths. The interest was one which, according to the law of forfeiture, if in force in *Calcutta* to its full extent, would pass to the Crown upon a valid finding of *felo de se*. A preliminary objection was taken, namely, that this claim could not be made by petition without reviving the suits in which the money was ordered to be brought into Court, those suits having abated by the death of *Rajah Kistonaath Roy*. But we are clearly of opinion that that objection cannot prevail. The case referred to by Mr. Justice Jackson, *In re Fervoise* (12 Beav. 209), is a decisive authority, if any authority were necessary to that effect. The main question, therefore, to be decided in this case is, whether or not the goods and chattels of a Hindoo are forfeited to the Crown upon its appearing by a Coroner's inquisition that he

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committed *felo de se* within the local limits of the jurisdiction of the Supreme Court at *Calcutta*. That must depend upon whether the English law by which the goods and chattels of a *felo de se* are forfeited to the Crown, has ever been introduced into *Calcutta*, and if so, whether it applies to Hindoos and Mahomedans, as well as to European British subjects. It is a well recognized doctrine, and one which has been acted upon by this Court for more than half a century, that, speaking generally, the first introduction of English law into *Calcutta*, was effected by the Charter of *George the First*, by which, in the year 1726, the Mayor's Court was established. It is unnecessary to cite authorities in support of that position; indeed, it was admitted by the learned Advocate-General in his argument in this case. The question is, whether the law by which the goods and chattels of a *felo de se* are forfeited to the Crown, was introduced by that Charter, or at any other time. It is unnecessary to go back to a period antecedent to the Charter, for even if it could be held that British subjects carried with them to *India* any part of the laws of *England*—and probably they did, from necessity, carry with them some of their own laws, such as those relating to marriage—it is clear that they did not carry with them any law which could entitle the Crown, prior to the acquisition of sovereignty, to the goods and chattels of a native *felo de se*, if such a term could be used prior to the introduction of the English law of Felony. We will, therefore, consider, first, whether such a law was introduced by the Charter; secondly, whether it was introduced subsequently by any law expressly extending to *Calcutta*; and thirdly, it was intro-

duced when *Calcutta* became part of the dominions of the Crown, as a necessary incident of sovereignty. It is clear, from the judgment of Lord *Brougham* in the case of *The Mayor of Lyons v. The East India Company* (1 Moore's Ind. App. Cases, p. 272), that in the year 1726, and for many years afterwards, *Calcutta* was merely a Factory, established for the purpose of trade, by British subjects in a Foreign territory. It was not at that time part of the dominions of the Crown, although the Crown exercised jurisdiction over it as a Factory, in the same manner as the Government of *England* and other European Governments have done in many similar cases. It is laid down by Lord *Brougham*, in the most explicit manner, that for a long period of time after the first acquisition, no English authority existed there, which could affect the land, or bind any but English subjects. The situation of *Calcutta*, at that time is so clearly pointed out in the judgment, that we cannot do better than read the following extract from it:—'The district on which *Calcutta* is built, was obtained by purchase from the *Nabob* of *Bengal*, the Emperor of Hindostan's Lieutenant, at the very end of the seventeenth century. The Company had been struggling for nearly a hundred years to obtain a footing in *Bengal*, and until 1696, they never had more than a Factory here and there, as the French, Danes, and Dutch also had. Till 1678, their whole object was to obtain the power of trading, and it was only then that they secured it by a *Firman* from the Emperor. From that year till 1696, they in vain applied to the native government for leave to fortify their Factory on the *Hooghly*, and it was only then that they made a fortification, acting upon a kind of

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half consent, given in an equivocal answer of the *Nabob*. Encouraged by the protection which they were thus enabled to afford the natives, many of them built houses, as well as the English subjects; and when the *Nabob*, on this account, was about to send a *Kazi*, or judge, to administer justice to those natives, the Company's servants bribed him to abstain from this proceeding. Some years afterwards the Company obtained a grant of more land and villages from the Emperor, with renewed permission to fortify their Factories. During all this period tribute was paid to the Emperor, or his officer, the *Nabob*; first, for leave to trade, afterwards as *Zemindars*, under the Emperor; and in 1757, the year memorable for the battle of *Plassey*, the treaty with *Jaffier Ally*, indemnifying them for their losses, ceding the French possessions, and securing their rights, and binding them to pay their revenues like other "*Zemindars*." Eight years later they likewise received from the native government a grant of the *Dewanny* or receivership of *Bengal*, *Behar*, and *Orissa*; and of their subsequent progress in power it is unnecessary to speak; enough has been said to show, that the settlement of the Company in *Bengal* was effected by leave of a regularly established government in possession of the country, invested with the rights of sovereignty, and exercising its powers; that by permission of that Government, *Calcutta* was founded, and the Factory fortified, in a district purchased from the owners of the soil by permission of that Government, and held under it by the Company as subjects owing obedience, as tenants rendering rent, and even as officers exercising, by delegation, a part of its administrative authority. At what precise time, and

by what steps, they exchanged the character of subjects for that of sovereign, or rather, acquired by themselves, or with the help of the Crown, and for the Crown, the right of sovereignty, cannot be ascertained. The sovereignty has long since been vested in the Crown, and though it was at first recognized in terms by the Legislature in 1813; the Statute, 53rd *Goe.* III. c. 155, s. 95, is declaratory and refers to the sovereignty as "undoubted," and as residing in the Crown; but it is equally certain, that for a long period of time after the first acquisition, no such rights were claimed, nor any acts of sovereignty exercised; and that during all that time no English authority existed there, which could affect the land or bind any but English subjects. The Company and its servants were then in the situation of the *Smyrna* or the *Lisbon* Factories at the present time.' Such being the case, we will now examine the Charter of *George I.*, in order to ascertain whether the law of forfeiture in the case of a *felo de se* was introduced by it. In the first place it recites 'that the United Company of Merchants trading in the East Indies have, by a strict and equal distribution of justice within the towns, Factories, Forts, and places belonging to the said Company, in the East Indies, and other parts beyond the *Cape of Good Hope* to the Straits of *Magellan*, very much encouraged, not only Our own subjects, but likewise the subjects of other Princes, and the Natives of the adjacent countries, to resort to, and settle in the said towns, forts, factories, and places for the better and more convenient carrying on of trade, by which means, some of the said towns, of factories, and places, are become very populous, and specially the town or place,

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anciently called *Chinapatnam*, now called *Madraspatnam*, and *Fort St. George*, on the coast of *Coromandel*, and also the towns, factories, or places called *Bombay*, on the Island of *Bombay*, and *Fort William*, in *Bengal*, in the said East Indies and parts aforesaid; \* \* \* and that there is a great want, in all the said places, of a proper and competent power and authority for the more speedy and effectual administering of justice in civil causes, and for the trying and punishing of capital and other criminal offences and misdemeanors, committed within the places and districts aforesaid, and in other the said Company's settlements.' Section 1, incorporates the Mayor and Aldermen of *Madras*. By section 7, a Sheriff is appointed. By section 9, a Mayor's Court is appointed. Section 14, constitutes the Governor, and five senior Members of the Council, Justices of the Peace, and a Court of Oyer and Terminer. Sections 16 to 22 incorporate the Mayor and Aldermen of *Bombay*, and give them similar powers. By sections 24 to 30, the same provisions are extended to the presidency of *Fort William* in *Bengal*. A Charter or Statute, by which Courts of Justice are constituted, does not necessarily determine the law which they are to administer, but in construing the Charter of *George I.*, there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place, and of the inhabitants, should admit. The words, give judgment according to justice and right, in suits and pleas between party and party, could have no other reasonable meaning than justice and right, according to the laws of *England*, so far as they regulated private rights between party and party. Such

general words could not possibly refer to any law, such as the Mortmain Act, or the Alien laws, which had reference merely to some views of public policy, supposed to be applicable to *England*, even though private rights might be affected by them. Still less could they be supposed to refer to the rights or revenues of the Crown, depending upon prerogative, and which were wholly inapplicable to a territory to which the sovereignty did not extend. Then, was the law of forfeiture of the goods and chattels of a *felo de se* introduced by those clauses of the Charter by which the Courts of Oyer and Terminer were established? The only words under which it could be included are those which authorize the Justices of the Peace or Commissioners of Oyer to proceed to the arraignment, trial, conviction, and punishment of persons accused of crimes and offences. It is unnecessary to decide, whether these words impliedly introduced the law of forfeiture in the case of attainder or conviction of Felony (forfeiture being no part of the sentence or punishment), or whether they introduced the whole law of forfeiture for crimes, including the prerogative right of a year and a day, and waste in lands of inheritance of a person attainted, or only some and what part of the law; whether the law, if introduced, extended to Natives, or to British subjects only, and if to Natives, whether their lands were to be considered as lands of inheritance or merely as chattels; or, finally, whether, if that branch of the prerogative which related to forfeiture was introduced, the somewhat similar right of the Crown to deodands was in like manner extended in the case of Natives. These and other nice points of law will have to be determined should the question

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ever arise. At present we express no opinion concerning them, nor as to the rights of the Crown in cases of crimes made felonies by Statutes passed since the sovereignty was acquired in *India*. At present we have merely to consider the question, so far as it relates to the goods and chattels of a Native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *felo de se*; and we now proceed to deal with that question, and with that question alone. It has been decided that the goods and chattels of felons of themselves are a different liberty, from the goods and chattels of felons, and that by the grant of one the other does not pass, *The King v. Sutton* (1 Saunders, 274 a). They are different in their nature, the former depending upon an inquisition of office taken, as it necessarily must be, after the death of the *felo de se*, the other resulting from an attainder on conviction of the felon after arraignment and trial in his presence. Now, the Charter of *George the First* clearly contemplated a trial. The recital is, that there is a great want of proper and competent power and authority for the more speedy and effectual administering of justice in civil causes, and for the trying and punishing of capital and other criminal offences and misdemeanors. It did not, and could not, recite that there was any want of the means of enforcing the Crown's prerogative right to the goods and chattels of felons of themselves, for the Crown had no prerogative rights in *Calcutta*. The Charter clearly contemplates the trial and punishment of persons accused of crimes, and not the creation of a right for the Crown, or the extension of any of its ordinary sources of revenue to a place in which the rights of sovereignty did not

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1st. Further, the grant of the right to hold Courts of Oyer and Terminer was made to the East India Company, and upon their petition and for their benefit, and not at the instance of the Crown. No Coroner was appointed, no provision was made for an inquest of office, and no Officer appointed to secure forfeiture. It was contended in argument, that as the Justices of the Peace, and Commissioners of Oyer and Terminer, had jurisdiction to try persons accused of murder, so they might hold an inquest of office and inquire by what means a man came to his death, in the same manner as Justices could in *England* when a body was thrown into the sea or could not be found, and the 3 Inst. p. 54, was cited as an authority. The same rule is laid down in 1 *Hale*, P.C. 413, for it is said to be within the extent of their commission. But the commission of Oyer and Terminer in *England* is, to inquire of all murders, felonies, manslaughter, killings, &c., by whomsoever and by whom, to whom, when, how, and in what manner, and also to hear and determine, &c. Whereas the power given by the Charter is to proceed by indictment or by such other ways, and in the same or the like manner as is used in *England*, as near as the condition and circumstances of the place will admit of; also to proceed to the arraignment, trial, conviction, and punishment of, persons accused of any crimes or offences, in the same manner and as near as the condition and circumstances of the place will admit of, as Justices of the Peace or Commissioners of Oyer and Terminer in *England* by virtue of their commissions. We doubt whether these words or the words immediately following—shall and may respectively do all other acts that Justices of the



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Peace and Commissioners of Oyer and Terminer usual and legally do—authorized the Governor and Council to hold inquests of office. But whether they did so or not, we feel confident, that they were never intended to give to a finding of *felo de se* upon such inquisition, the effect of vesting the goods and chattels of the offender in the Crown, to be carried to *England*, as part of the ordinary revenues of the Crown. If such had been the intention some provision would have been made for allowing the relatives of the deceased to traverse the inquisition, if not true, or to quash it if bad in law. Neither of these powers was given, nor was there any Court in existence which had power to try such traverse or to quash the inquisition. It could not be intended that the Mayor's Court should quash the inquisition of the Court of Oyer and Terminer, or try a traverse of the finding; for, independently of the fact, that the Mayor and Aldermen before whom the Mayor's Court was held were inferior to the President and Council who composed the Court of Oyer and Terminer (an appeal lying from the Mayor's Court to the President and Council), the Mayor's Court was authorized to try any civil suits, actions, and pleas between party and party. No Officer was appointed to appear for the Crown, and no case was intended to be tried before them in which they could not award execution for costs, either against the goods of the person of the Plaintiff or Defendant, as the case might be; a process which could not have been used in the case of the Crown; nor could it be intended to give jurisdiction to the Court of Oyer and Terminer to quash the inquisition taken before themselves, or to try a traverse

of the finding upon their own inquisition. Such a power was not one which could be exercised by a Court of Oyer and Terminer in *England*. We are, therefore, of opinion, that the Charter of *George I.* did not intend to render the goods and chattels of a *felo de se* liable to be forfeited to the Crown, even in the case of a British subject. But, even if it did so, it is wholly improbable that such a law should have been intended to apply to Mahomedans and Hindoos, even if the Crown had the power at that time to make a law binding upon them, which is disputed by Lord *Brougham*. At that time there was no law in *India* by which property was forfeited by suicide. By the Mahomedan law suicide was not an offence, and did not cause any forfeiture of property. Even wilful homicide was justified, if committed at the request of the person killed. Nor should it be forgotten that at that time *Suttee*, though not enjoined by the religion of the Hindoos, had not been declared to be a crime; and that the ignorant and deluded votaries of *Juggernaut* were under the belief that eternal happiness was obtained by self-sacrifice under the wheels of the Idol's car. It can scarcely be imagined that the Crown could have intended to introduce into a Factory in a Foreign territory the prerogative of forfeiture, and to render that prerogative applicable not only to its own subjects but to the subjects of a foreign Government over whom it had no power. Had such an intention been apparent, it would have been beyond the legal powers of the Crown to give effect to it. Having decided that the law was not introduced by the Charter of *George I.*, the question is, has it ever been introduced at any other period? We find nothing to lead us to the

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conclusion that it has been, nor indeed, has there been any such contention on the part of the Crown. It has not been urged, nor could it in our opinion have been urged with success, that the law was introduced by the 33rd *Geo.* III., c. 52, s. 157. By that section, the Governor-General in Council at *Fort William*, was authorized and empowered to appoint as many Coroners as he should think fit for the purpose of taking inquests upon the bodies of persons coming, or supposed to have come, to an untimely end; and such Coroners are vested with the like powers and jurisdictions as by law may be executed by Coroners in *England*. But there is nothing in that Act to show, that it was intended to introduce any law of forfeiture if it did not previously exist. If a law had existed by which the goods and chattels of a *felo'de se* were forfeited to the Crown, the appointment of Coroners might have provided means for putting the law into force, even though it might previously have lain dormant for want of the necessary machinery. The appointment of a Coroner could not alter the law, though it might have provided a means for enforcing a law. The appointment of a Coroner could no more render a person in *Calcutta* liable to forfeiture of his property for *felo de se*, than it could make the act of wilful and intentional self-destruction in the *Mofussil* a Felony, in order that forfeiture might be the consequence; and it must not be forgotten that the power of appointing Coroners was not limited to the Presidency towns, it extended to the whole of the Presidencies, and consequently if it introduced the law of forfeiture in the case of a *felo de se*, it did so not only in the Presidency towns; but also in the *Mofussil*, where Felony was not known as a crime,

and where the Mahomedan criminal law prevailed, by which, as before shown, self-destruction was not a crime. Our attention has been called to the case of *The Collector of Maşulipatam v. Cavalv Vencata Narainapah* (8 Moore's Ind. App. Cases, 500). In that case it was held, that the general right of the Crown to succeed to immoveable property on failure of heirs was not excluded in the case of a Brahmin. The law of escheat was not disputed; the question raised was, whether the Crown could succeed to the property of a Brahmin on failure of heirs. In the present case the general right of the British Crown to succeed to all property, whether moyable or immoveable, upon a total failure of heirs is not disputed. That right attached immediately upon the acquisition of the sovereignty by the Crown as a necessary incident thereto, not only in those places such as the Presidency towns, in which the laws of *England* had been partially introduced, but in every other part of *India* over which the Sovereignty had been acquired. The right of the Crown exists, as well in the case of Mahomedans and Hindoos, as in the case of British subjects. Here there is no failure of heirs, but a claim on the part of the Crown by title paramount, upon the ground that the property was vested in the Crown by forfeiture before it came to the heirs. If the property of a Mahomedan, or a Hindoo, were claimed by the Crown upon the ground of a failure of heirs, the question of failure, or no failure of heirs, would not depend upon English law, but upon the Mahomedan or Hindoo law of inheritance, as the case might be. So here the question depends upon the law applicable to the offence. If the English law was

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introduced as to *felo de se*, and the property' was liable to forfeiture upon the finding of a Coroner's inquisition, the forfeiture would, no doubt, vest in the Crown by virtue of its prerogative. All we have to show here is, that the prerogative of the Crown did not of itself make self-murder a Felony, or subject the offender to the forfeiture of his goods and chattels. if the prerogative of the Crown rendered self-murder a Felony in *Calcutta*, and necessarily introduced the law of forfeiture as an incident, it must have had the same effect in every part of the British dominions in *India* over which the right of Sovereignty was acquired. It is not a necessary incident of Sovereignty that every offence for which property is forfeited in *England* should be a Felony, and cause a similar forfeiture in every part of the dominions of the Crown, otherwise it must follow that the right of Sovereignty introduced the law of a year and a day, and waste, in the case of attainder, in the *Mofussil*, and also the right to deodands. We hold that the law of forfeiture in the case of *felo de se*, has never been introduced into *Calcutta*, and consequently that the estate of *Rajah Kistonaath Roy* was not forfeited to the Crown. This petition, therefore, must be dismissed. There will be no order as to the costs, for it is a petition presented on behalf of the Crown, and we doubt if there is any jurisdiction in this Court to order costs to be paid by the Crown."

The present appeal was from this decision.

Mr. *Forsyth*, Q. C., and Mr. *W. H. Melvill*, for the Appellant.

The question in this case is, the right of the

Crown to the goods of a *felo de se*, a Hindoo inhabitant of *Calcutta*, and a subject of Her Majesty. There is no dispute regarding the commission of the crime within the town of *Calcutta*, or that the inquisition and finding by a jury before the Coroner of *Calcutta*, appointed by Statute, 33rd *Geo.* III. c. 52, sec. 157, was not strictly regular. By the Charter of 1774, sec. 4, which established the Mayor's Court of Oyer and Terminer and Criminal Jurisdiction, the office of Coroner was first introduced into *India*, the Judges of that Court being appointed Coroners. In this case the finding was officially communicated by the Coroner to the Government and the Accountant-General and Master of the Supreme Court at *Calcutta*, who had custody of part of the assets of the deceased, as well as notice given to the Collectors of the several *Zillahs* in which his property was situate, of the forfeiture of the goods and chattels to Her Majesty, and that meets in anticipation any question of delay, or waiver, in making or in enforcing our claim. [Lord *Kingsdown*: The claim arose twenty years ago. The parties might then have traversed the inquisition.] —The waiver relied on now, is merely an intimation of the Officers of the Crown here, that they did not claim on behalf of Her Majesty; leaving it, therefore, for the Government in *India* to make the claim, and assert its right.

Now, first, the law prescribing the forfeiture of goods and chattels of a *felo de se*, is part of the Common law of *England*, and under the Charter of the 13th *Geo.* I., the Supreme Court at *Calcutta* is bound to administer the Common law of *England*, as it was in the year 1726, unless such law has been subsequently altered by Statutes extending to *India*, or by Act of the Legislature of *India*; and our con-

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tention is, that no Imperial Statute, or Legislative Act, has altered the Common law in this respect. The history of the establishment of the British rule in *India* is elaborately treated of by Lord *Brougham*, in the case of *The Mayor of Lyons v. The East India Company (a)*, and the rule as to the introduction of English law in *Calcutta* is furnished by the finding of the Master, and the decision of Lord *Lyndhurst* in the case of *Freeman v. Fairlie (b)*, in which it was held, that a Will to pass lands in *Calcutta* must be attested by three witnesses. The introduction of the English law, as applicable to the Natives of *India*, must be referred to the establishment of the Mayor's Court by the Charter of 1726, though that Court has been subsequently superseded by the establishment of the Supreme Court at *Calcutta*, by the Charter of 1774, when the English laws were introduced to their full extent, and with all their consequences, *Auber's Analysis of the Const. of the East India Comp.* p. 234.—[Lord *Kingsdown*: When was the English law binding on the people in *Calcutta*?]—It existed in 1726.—[Lord *Kingsdown*: It certainly could not be binding when *Calcutta* was a mere Factory for the purpose of trade. Neither could the Criminal law, in all its branches, now be applicable to Hindoo natives. Take the case of Bigamy for instance.]—The English Criminal law, we apprehend, must be taken as generally introduced in *India* by the Charter of 1726.—[Sir *James Colvile*: The Mahomedan Criminal law was retained by Reg. IX., of 1793, secs. 47, 50, 74, and 75. It was only in 1832, by Reg. VI. of that year, sec. 5, that persons not professing the Mahomedan faith could claim the exemption from being tried under  
 (a) 1 Moore's Ind. App. Cases, 175, 272-3. (b) *Ib.* 309, 352.

that law.]—By the Statutes, 13th *Geo.* III., c. 63, sec. 14 and the 26th *Geo.* III., c. 57, sec. 29, the English law was applied to Natives as well as British subjects. Statutes, 9th *Geo.* IV., c. 74, embodied all the Criminal law of *England* in *India*. *Suttee* was a crime, but was tolerated, in compliance with the reservation of the 37th *Geo.* III., c. 142, sec. 12, which respects religious usages, but *Suttee* was abolished by Regulation XVII. of 1829. So with respect to the crime of infanticide; these were, however, exceptional cases coming within the special usages reserved to the Hindoos. Then, the material question to be considered is, whether by the Charters and Statutes, the English Criminal law is not to be taken as imported into *Calcutta*, and in force there at the time the *Rajah*, committed suicide. He was beyond all question a British subject, and as such was amenable to the law that had been introduced into *India* by the Charters and Acts of Parliament. The best exposition of the rule as to the governing law, is to be found in the *dictum* and decision of Lord *Mansfield*, in the well-known case of *Campbell v. Hall* (a), where he says, "That the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in *Ireland*, *Minorca*, the *Isle of Man*, or the Plantations, has no privileges distinct from the natives." It follows, therefore, that in no case have the Natives of a Colony or Settlement privileges distinct from the settlers, unless such rights have been specially reserved to them. Lord *Stowell*, in *Ruding v. Smith* (b), quotes Lord *Mansfield's* proposi-

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(a) 1 Cowp. 208.

(b) 2 Hagg. Cons. Rep. 383.



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tion with approbation, and says," *Huber*, too, speaking upon general principles, had before promulgated the same doctrine:—" *pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorantur.*" *De Conflict. Leg. lib. I. t. 3, § 2.* The question of the extent of the introduction of the English law in *Grenada* in the *West Indies*, was also considered by Sir *William Grant* in *The Attorney-General v. Steward (a)*, and to *Gibraltar*, by this Tribunal, *Jephson v. Riera (b)*. Wherever, therefore, the English law has been introduced, including of course the Criminal law, self-murder is a felonious crime. It is viewed by the English law as the highest crime, *Stephens*, Comms. Vol. IV. p. 108.—[Lord *Kingsdown*: Do you contend that the law of forfeiture was introduced by the Charter of 1726?]—It may not be introduced by Charter, or Statute, in express words, but the appointment of a Coroner assumes the introduction of the English law of *felo de se*, and that there is judicial machinery for executing it. No reason appears why the law of forfeiture should not apply to Natives as well as Europeans.—[Sir *Lawrence Peel*: Does not your argument go too far? It would introduce the law of primogeniture and dower among Natives]—If suicide is a crime, of course to assist a suicide is also a crime. Now, the Indian Penal Code of 1860, applies to the whole Territories vested in the Crown by Statute, 21st & 22nd *Vict. c. 106*. This Code assumes, but nowhere specifies or defines, that suicide is a crime. The 53rd section enumerates a list of punishments for offences under the Code, and expressly mentions in sec. 62, forfeiture of property

(a) 2 Mer. 160.

(b) 3 Knapp's P. C. Cases, 130.

for offences ; and by sec. 302 it is enacted, that whoever commits murder shall be punished with death, or transportation for life, and shall be liable to fine. Section 306 says, if any person commits suicide, or whoever abets the commission of such suicide, shall be punished with imprisonment for a term, and shall also be liable to fine ; and section 309 provides, that whoever attempts to commit suicide shall be punished with imprisonment, for a term not exceeding one year, and shall also be liable to a fine. Now, it would be illogical to suppose that suicide is not a crime ; the Code assumes that it is, and the Code applies to Hindoos and Mahomedans, as well as to Europeans.—[Lord *Kingsdown* : You cannot punish the individual who commits suicide. The Code only applies to those who attempt, or abet it.]

The important question of the prerogative of the Crown was not, however, considered by the Court below, and we contend that the same prerogative must attach in *Calcutta* as in the other British Colonies, *Chalmers' Opinions* Vol. I. p. 232. Now, the right to forfeiture of goods and chattels is part of the prerogative of the Crown in this country. *Stephens, Comms.* Vol. II. a. 495 (5th Edit.), enumerates the prerogatives, and among them mentions forfeitures for offences. So treasure trove, as by the ancient law of *India*, *Inst. Of Menu*, ch. VIII. secs. 37, 38, and Royal fish, are most ancient prerogatives of the Crown. In *Bacon's Abr.* tit. "Forfeiture" B, it is laid down, that if a man be *felo de se* he forfeits his goods and chattels (a) ; and in the note to *Toomes v. Etherington* (b), it is stated to accrue on inquisition.—

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(a) See also *Megit v. Johnson*, 2 Doug. 545. (b) 1 Saunders. 362.

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[Lord *Kingsdown*: The Common law, as stated in that case, distinguishes the forfeiture of lands and goods. The former is only upon attainder. Now, in *India* there is no distinction by Hindoo law between real and personal estate].—Lord *Brougham*, in *The Mayor of Lyons v. The East India Company (a)*, enumerates the prerogatives the Crown is entitled to in *India*. That case, however, does not apply to the question here raised. The law there determined as to aliens holding lands, is by Statute, and is not part of the Common law. No doubt the prerogative attaches in cases of *felo de se* in *India*, whether by a British subject, or native Hindoo, if committed within the jurisdiction of the Supreme Court.

The Charter, 13th *Cha.* II., in 1661, upon the petition of the East India Company, granted the Governor, and East India Company, power to judge all persons living under them, and under that Charter the English law was administered in *Calcutta*. There was no Territorial sovereignty at that time, and, therefore, it did not extend to Natives. The Statute, 53rd *Geo.* III. c. 155, sec. 95, though it is the first statutable recognition of the sovereignty of the British Crown in the East Indies, was only declaratory of the existing law; for the Charter, 9th & 10th *Will.* III., expressly says, "The Sovereign right being always reserved over Forts, Factories, &c." Such right, therefore, existed in 1698, and the Statute, 13th *Geo.* III. c. 63, shows clearly that the Crown and Parliament recognized the Sovereignty of the East India Company. In *The East India Company v. Syed Ally (b)*, these rights were upheld; and in the cases of *The Secretary of*

(a) 1 Moore's Ind. App. Cases, 281. (b) 7 Moore's Ind. App. Cases, 555.

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*State for India v. Kamachee Boye (a)*, and *The Collector of Masulipatam v. Cavalry Vencata Narainapāh (b)* the Government of India was held entitled to take as an escheat a *Raj*, for want of male heirs. It has been determined that goods of a felon convicted in India are forfeited. That point arose in *Bombay, The Advocate-General v. Richmond (c)*, and the right was not questioned; the only point raised being, whether the Crown or the East India Company was entitled to the escheat of the felon's goods; a point which does not arise here. In the matter of *Govinda Lala (d)*, goods, the property of a *felo de se*, were ordered by the Court to be delivered over to the East India Company as grantee of the Crown; and in *Khanoo Raoot Kulvekur v. Dhunbajee Kan (e)*, drift timber was held to belong to the Crown. No instance of forfeiture for Treason can be found.

Mr. *Bovill*, Q. C., and Mr. *Cave*, for the Respondent

It lies on the Appellant to establish the proposition advanced by him—namely, that forfeiture of goods and chattels of a suicide is part of the law of India, applicable to Hindoos. The unanimous opinion of the judges of the Supreme Court was, that the English law of forfeiture of the goods of a *felo de se*, did not apply to native Hindoos, unless it was specifically introduced by Statute, or Local enactment. The Appellant has failed to produce a single case in which a forfeiture of goods has been enforced by the Government in India for suicide. *Govindo Lala's*

(a) 17 Moore's Ind. App. Cases, 476; and see *The Rajah of Coorg v. The East India Company*, 29 Beav 300.

(b) 8 Moore's Ind. App. Cases, 500. (c) *Perry's Oriental Cases*, 566.

(d) 1 *Strange's Mad. Cases*, 74. (e) 2 *Borr. Bom. Rep.* 273.

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case (a), when examined, is no authority for such a proposition. It is simply the case of a Native who died without heirs, or next of kin, and the Court directed his property to be handed over to the Registrar, for the benefit of the East India Company. Being *bona vacantia*, the Sovereign right accrued. The *Bombay* case, *Khanoo Raqot Kulvekur v. Dhunbajee Kan* (b) was a case of flotsam, and the right of the Crown was recognized, which might be in virtue of the tenure under which *Bombay* is held—namely, as part of the Manor of *East Greenwich*. These are the only two cases that can be brought to support such a claim as this. Then, there being no direct authority for the position contended for, is there any principle, or analogy of law, to support it? Our contention is, that the English law of Felony by self-murder, and consequent forfeiture of goods and chattels, has never been introduced, and cannot be applied, to Natives in any part of *India*. In *England* the ground of forfeiture is stated to be derelict; *Bacon's* Abr. tit. "Forfeiture," B.—[Lord *Kingsdown*! Was the forfeiture in *England* derelict, or was it not a punishment attached to *felo de se*?]—It may be punishment. A man takes his life away, and leaves goods and chattels; *Bacon* there lays it down, that the King takes them as the maintainer of public justice. By the feudal law of tenure, if a man deprives the Lord of a vassal, the Lord was entitled to compensation. So if the Tenant dies a natural death, the Lord could seize the best beast, or armour, according to custom, for a Heriot. By the Saxon law, land did not escheat for Felony. *Reeves's* "Hist. of the English Law," Vol. 1. p. 10. So as to right of dower, Co. *Litt.* 41a;

(a) 1 *Strange's* Mad. Cases p. 74. (b) 2 *Borr. Bom. Rep.* 273.

*Spelmen*, "On Tenures" p. 53; and *Yorke's* "law of Forfeiture for High Treason," pp. 54, 56. It is doubtful whether forfeiture for *felo de se* existed in *England* before the introduction of the feudal system. It appears it did for Murder. In *Stiernhook*, "*De Fure Sueonum et Gothorum*," lib. II. ch. 6, and lib. III. ch. 3, forfeiture is spoken of for high Treason, but not for *felo de se*. He quotes the laws of *Alfred*, ch. IV. where it is thus laid down:—"Si quis vitæ Regis insidiatur per se, vel per ultores merede conductos vel servos suos, vitâ privetur, et omnibus quæ possidet." Then it goes on, "Si quis vitæ Domini sui insidiatur hoc ipso vitam suam amittat, et omnia quæ possidet vel pro ratione æstimationis capitis Domini sui culpa eximatur." And the law of *Canute*, ch. LIV., is similar:—"Si quis Regi vel Domino insidiatur fuerit, vitam suam perdat, et omne quod habet nisi ad triflex ordalium pergat." Forfeiture is purely a part of the feudal policy which has never been introduced into *India*, or is capable of being applied to Hindoo Natives under the British rule. The law and customs of the Hindoos have always been respected and preserved to them. This was the provision of the Statute, 21st Geo. III. c. 70, sec. 17, and the assurance given to the Natives by Sir *Elijah Impey*, the first Chief Justice, when the Charter of 1774 was brought into force. "Memoirs of Sir *Elijah Impey*, Ed. by his son," Appx. 427, [8vo. *Lond.* 1846].

There can be no doubt as a general proposition, that Englishmen settling in an uninhabited country carry with them as their birthright so much of the law of *England* as is applicable to, and requisite for, the state of the settlement, which will include, of course, so much of the Common law as is applicable to

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their condition, as well as the Statute law, *Chalmers' Opinions*, Vol. I. p. 195. But the case of the original Settlements in the *East Indies* is quite different, as is shown in the history given in *The Mayor of Lyons v. The East India Company*. The first settlers were only traders permitted by the Government of the *Nabob of Bengal* to reside and have Factories within his dominions. It was not until many years afterwards that they acquired as a Company, first Territorial and then Sovereign right by Charters and Treaties. It was long after the establishment of the Company as a trading body, that they acquired anything like Sovereign rights. In the first instance, such of the Company's servants within the Factories as chose to adopt the English laws were permitted by the Crown to do so. Indeed, all the authorities show, that the English law was never generally, but only partially, introduced in *India*. Thus it has been held by the Supreme Court at *Calcutta* that the laws against Popery did not extend to *India*, *D'Conto v. Da-Costa* (a); and that the Statute making carnal knowledge of a female under the age of ten years, a Felony, did not extend to *India*, *Rex v. Chundichurn Bose* (b); and by this Tribunal that the Mortmain law was not in force in *India*, *The Mayor of Lyons v. The East India Company* (a). It will only be necessary to trace the introduction of the English law into *Calcutta*, to show that this branch of the Criminal law was not in force in *Calcutta* at the time of the

(a) Morton's Dec. Cal. 356.

(c) Morton's Dec. Cal. 357.

(b) 1 Moore's Ind. App. Cases, 176; and see on this point, *Mitford v. Reynolds*, 1 Phill. pp. 185, 192. *Whicker v. Hume*, 7 H. L. Cases, 124. *Attorney-Gen. v. Steward*, 2 Mer. 143. *Clark's Col. Law*, p. 7.

commission of this suicide. The third Charter of *April* 3rd, 1661, gave power to the Governor and Council, where the East India Company had Factories, or places of trade within the *East Indies*, to judge all persons belonging to the Company, or under their control, in all cases, Civil or Criminal, according to the laws of *England*. The Charter of 1726, provided for the administration of justice in Civil and Criminal cases within the Factory of *Fort William*, by creating the Mayor's Court, and for the punishment of persons accused of any crime, to be as near to the laws, of *England* as the condition and circumstances of the place and inhabitants would admit of. The Charter of 1753, substantially repealed those two Charters, and gave to the East India Company, besides further jurisdiction, fines and amercements made by the Court. Then came the Statute, 13th *Geo.* III. c. 63, sec. 13, and the Charter of 1774, which established the Supreme Court at *Calcutta*, as a Court of Oyer and Terminer, within the town of *Calcutta* and the Factory of *Fort William*, within jurisdiction over Murder, and other felonies and misdemeanors, had, done, or committed within, the Town and Factories. The Statute, 21st *Geo.* III. c. 70, sec. 17, gave the Supreme Court jurisdiction to entertain suits and actions of the native inhabitants of *Calcutta*, providing that the inheritance and succession to lands, &c., and contracts should be determined in the case of Mahomedans, by the Mahomedan law, and of Hindoos by the Hindoo law. And section 18 of that Statute expressly enacted, that the civil and religious usages of the Natives were to be respected and acts done, according to the rule and

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law of caste, were not to be adjudged as crimes, although the same may not be justifiable by the law of *England*. Section 19 also provided, that the process of the Supreme Court was to be accommodated to the religion and usages of the Natives. At this period *Suttee*, as well as infanticide, prevailed in *India*, and were, therefore, sanctioned by the law and recognized by the Government as part of the religious usages of the Natives. Then came the 33rd *Geo.* III. c. 52, sec. 157, which, for the first time, appointed Coroners for the Presidencies in *India*, empowering them to hold inquests in the same manner as Coroners in *England*. It is this Act that the other side now insist gives the right to the East India Company to seize the goods and chattels of a *felo de se*. But besides that they have failed to prove that the appointment of such Officers as Coroners would give the Crown a prerogative not previously enjoyed, it is impossible to argue that such a forfeiture would accrue for an offence held not only not blameable by the Hindoo inhabitants of *India*, but in the case of widows, absolutely praiseworthy, and in accordance with the religion of the country. *Felo de se* was, in fact, at this time, no offence at all. The Statute, 9th *Geo.* IV. c. 74, after reciting that many wholesome alterations have been made in the Criminal law of *England*, and the administration thereof, and that it was expedient that some of the said alterations should be extended to the British Territories in the *East Indies*, enacts, by section 18, that when any person shall be arraigned upon an indictment or inquisition for Treason, or Felony, the jury empanelled to try such persons shall not be charged to inquire concerning the lands, tenements, or goods, nor

whether he fled for such Treason or Felony. But under this Statute, however, there must be a trial for Felony, not an inquisition, or inquiry, as before a Coroner. It is true that, by the 16th & 17th *Vict.* c. 95, sec. 27, all fines and penalties incurred by the sentence or order of any Court of justice within the Territories under the Government of the East India Company, and all forfeitures for crimes, of any real and personal estate within those Territories, and all property devolving as *bona vacantia*, for want of a rightful owner, shall belong to the East India Company, in trust for Her Majesty, for the service of the Government of *India*; and that by the 21st & 22nd *Vict.* c. 106, the Territories in the *East Indies* are absolutely vested in the Crown. None of these Statutes, however, introduced the English law of forfeiture of the goods and chattels of a *felo de se*, which is nowhere designated as a Felony in *India*, and is not even mentioned until the Penal Code of 1890, which first designated such a crime in *India*. Sec. 306 of the Code enacts, that if any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment for a term not to exceed ten years, and shall also be liable to fine; and section 309 enacts, that whoever attempts to commit suicide shall be punished with simple imprisonment for a term of one year, and shall also be liable to fine; thus making the aiding and abetting a *felo de se* a misdemeanour; whereas such aiding or abetting by the Criminal law of *England* is a Felony, the party being a principal in the first degree. How then can it be argued, that with such a provision as this, there could have been previously anything like the English law of forfeiture prevailing

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in *India*? By the Common law of *England*, to assist another to commit suicide is murder. This is conclusive, that even at the time the Code was passed, forfeiture for *felo de se* was not considered part of the English law introduced into *India*; still less could it have been the law in the year 1774, the date which the Appellant's Counsel insist, that this branch of the Criminal law of *England* was introduced into *Calcutta*; at a time too when we have shown it was not considered an offence there even if committed.

Supposing, however, the law of forfeiture of goods of *felo de se*, to have been introduced in *India*, and applicable to Europeans, it does not apply to Hindoos and other Natives, by whom, in many cases, self-destruction is considered not merely legal, but even meritorious. Thus, *The Vakeel of Government v. Sohawan* (a) was the case of a Hindoo of the *Rajpoot* tribe, who had prepared a pit and set fire to the fuel in it, to enable his father, who was ill with the leprosy, to burn himself, and the prisoner was held justified under the tenets of the Hindoo religion, and acquitted under the provisions of the Mohamedan law; and the case of *Sheeroo Suharee and Chottoo* (b) is to the same effect. Suicide from leprosy, or *Suttee*, though both are within the letter of sec. 3, *Ben. Reg. VIII.*, of 1799, yet have not been considered by the *Nizamut Adawlut* within the purview of that section (c); which Regulation, as there stated, was intended to preserve the lives of many from the effects of passion or revenge, aided by the enormous prejudice of superstition. The Institutes of *Menu* treat of punishment for certain offences, but nowhere mention

(a) 1 Niz. Adaw. Rep. 220.

(b) *Ib.* 292.

(c) See note to *Sohawan's Case*, 1 Niz. Adaw. Rep. 221.

forfeiture, for suicide. A Hindoo committing suicide does not alter the rule of succession, *Strange's "Hindu Law,"* vol. I. p. 157.

Another important point, is the question of the deceased's domicile. His domicile was *Berhampore*, about one hundred miles from *Calcutta*, and though he commits suicide at *Calcutta*, that fact will not give the Supreme Court jurisdiction over his personal property. [Sir *Lawrence Peel*.—He had residence at *Calcutta*, which would make him subject to civil process. (a)]

Lastly, regard being had to the proceedings of the Indian government, and to the absence of any claim on the part of the Crown, and the ultimate waiver of its rights, if any, it would be inequitable to enforce the law of forfeiture, if it exists in *India*, which we deny, against the estate of *Rajah Kistonaath Roy*. If the Crown had insisted upon its prerogative, under the Statute, 3rd & 4th Will. IV. c. 85, the inquisition might have been traversed, which could have been done with effect, *Toomes v. Etherington* (b), 1 *Hale*, P. C. 417, first, as being against evidence, and, secondly, on the ground of the misdirection of the Coroner. The Government have stood by for twenty years without asserting its claim.

The consideration of the case was adjourned, and their Lordships' judgment was now delivered by

The Right Hon. LORD KINGSDOWN :

The question in this case arises on the claim of the Crown to a portion of the personal estate of *Rajah Kistonaath Roy*, who destroyed himself in

(a) See *Baboo Janokey Doss v. Binabun Doss*, 3 Moore's Ind. App. Cases, 175.

(b) *Saunders*, 363a.

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*Calcutta* on the 31st of *October*, 1844, and was found by inquisition to have been *felo de se*.

We understand that the *Rajah* had a residence in *Calcutta*, though his *Raj*, or *Zemindary*, was at some distance from that city. He was a Hindoo both by birth and religion.

On the morning of the day on which he destroyed himself he made a Will, by which he left a large portion of his property to the East India Company for charitable purposes.

The Will was disputed by his widow, who was his heiress, and a suit was instituted by her against the East India Company and others, to determine its validity. It was agreed between the litigating parties that the question should be tried by an issue at law. The widow insisted, amongst other objections, that the Testator was not in a fit state of mind to make a Will at the time of its execution.

The issue was tried, and a verdict was found by the judges against the Will, upon what ground does not distinctly appear, and the verdict was acquiesced in by the Indian Government.

If the Crown, by virtue of the inquisition, was entitled to all the personal property of the *Rajah*, the validity or invalidity of the Will was, as regards his personal estate, of no importance.

Now, the inquisition had found that the goods and chattels of the *Rajah* when he committed self-murder amounted within *Calcutta* to Rs. 9,87,063, and without the town of *Calcutta* to Rs. 2,89,500; and it stated that all this property was claimed by the widow.

No claim to any part of it appears at that time to have been set up by the East India Company on be-

half of the Crown, and very large sums were from time to time, by the order, or with the consent of the Indian Government, paid over to the widow in the years 1846 and 1847.

A portion, however, of the *Rajah's* personal estate, amounting to between six and seven lacs of Rupees, was secured in the Supreme Court, in order to provide for the payment of life annuities to two ladies, both then living. The existence of these charges seems to have been the only reason why this fund was not transferred to the widow with the rest of the estate.

One of the annuitants is now dead, and the fund reserved to answer her annuity is of course set free. This fund is now claimed by the Indian Government under the finding on the inquisition of 1844.

It is stated in the affidavit of a gentleman who was Manager for the widow on the death of her husband, that he was advised in 1844, by three English Counsel of eminence, whom he names, that the verdict on the inquisition might be set aside on the ground both of misdirection by the Coroner, and as being against the weight of evidence, but that proceedings were not taken for that purpose, because the Government represented, through its law agents, that no claim would ever be made under the verdict.

If the facts be such as we have stated, it is impossible not to feel some surprise at the present demand; and, if we differed from the Court below, it would deserve much consideration, whether a claim which seems to have been abandoned in 1844, ought now to be entertained. But these facts do not seem to have been noticed by the Judges in *India*; there may

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possibly be circumstances with which we are unacquainted to account for the course taken by the Government, and we think it better to dispose of the case on the merits.

At what time then, and in what manner, did the forfeiture attached by the law of *England* to the personal property of persons committing suicide in that country, become extended to a Hindoo committing the same act in *Calcutta*?

The sum of the Appellant's argument was this:—that the English Criminal law was applicable to Native as well as Europeans within *Calcutta*, at the time when the death of the *Rajah* took place, and the sovereignty of the English Crown was at that time established; that the English settlers when they first went out to the East Indies in the reign of Queen *Elizabeth* took with them the whole law of *England*, both Civil and Criminal, unless so far as it was inapplicable to them in their new condition; that the law of *jelo de se* was a part of the Criminal law of *England* which was not inapplicable to them in their new condition, and that it, therefore, became part of the law of the country.

Where Englishmen established themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws.

But this was not the nature of the first settlement made in *India*—it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government

of a powerful Mahomedan ruler, with those sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in *India* they retained their own laws for their own government within the Factories, which they were permitted by the ruling powers of *India* to establish; but this was not on the ground of general international law, or because the Crown of *England* or the laws of *England* had any proper authority in *India*, but upon the principles explained by Lord *Stowell* in a very celebrated and beautiful passage of his judgment in the case of "*The Indian Chief*" (3 Rob. Adm. Rep. 28).

The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians that they have usually been allowed by the indulgence or weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahomedans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them, but they are recognized in the judgment to which we have above referred.

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But, if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The question, therefore, and the sole question in this case is, whether by express enactment the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindoos destroying themselves in *Calcutta*.

We were referred by Mr. *Melville* in his very able argument, to the Charter of Charles II. in 1661, as the first, and indeed the only one which in express terms introduces English law into the *East Indits*. It gave authority to the Company to appoint Governors of the several places where they had or should have Factories; and it authorized such Governors and their Council to judge all persons belonging to the said Company, or that should live under them, in all causes, whether Civil or Criminal, according to the laws of the Kingdom of *England*, and to execute judgment accordingly.

The English Crown, however, at this time clearly had no jurisdiction over native subjects of the *Mogul*, and the Charter was admitted by Mr. *Melville* (as we understood him) to apply only to the European servants of the Company; at all events it could have no application to the question now under consideration. The English law, Civil and Criminal, has been usually considered to have been made applicable to Natives, within the limits of *Calcutta*, in the year 1726, by the Charter, 13th *Geo. I.* Neither that nor the

subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.

But none of these Charters contained any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the Charters did extend, the application of the criminal law of *England* to Natives not Christians, to Mahomedans and Hindoos, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty.

To apply the law which punishes the marrying a second wife whilst the first is living, to a people amongst whom polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied.

In like manner, the law, which in *England* most justly punishes as a heinous offence, the carnal knowledge of a female, under ten years of age, cannot with any propriety be applied to a country where puberty commences at a much earlier age, and where females are not unfrequently married at the age of ten years.

Accordingly, in the case referred to in the argument, the law was held not to apply.

Is the law of forfeiture for suicide one which can be considered properly applicable to Hindoos and Mahomedans?

The grounds on which suicide is treated in *England* as an offence against the law, and punished by forfeiture of the offender's goods and chattles to the King, are stated more fully in the case of *Hales v. Petit*, in *Plowden's Reports*, P. 261, than in any other book

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which we have met with. It is there stated, that it is an offence against nature, against God, and against the King. Against nature, because against the instinct of self-preservation; against God, because against the commandment, "Though shalt not kill," and a *felo de se* kills his own soul; against the King, in that thereby he loses a subject.

Can these considerations extend to native Indians, not Christians, not recognizing the authority of the Decalogue, and owing at the time when this law is supposed to have been introduced no allegiance to the King of *Great Britain*?

The nature of the punishment also is very little applicable to such persons. A part of it is, that the body of the offender should be deprived of the rites of Christian burial in consecrated ground. The forfeiture extends to chattels real and personal, but not to real estates; these distinctions, at least in the sense in which they are understood in *England*, not being known or intelligible to Hindoos and Mahomedans.

Self-destruction, though treated by the law of *England* as Murder, and spoken of in the case to which we have referred in *Plowden* as the worst of all Murders, is really, as it affects society, and in a moral and religious point of view, of a character very different not only from all other Murders, but from all other Felonies. These distinctions are pointed out with great force and clearness in the notes attached to the Indian Code, as originally prepared by Lord *Macaulay* and the other Commissioners. The truth is, that the act is one which in countries not influenced by the doctrines of Christianity has been regarded as deriving its moral character altogether

from the circumstances in which it is committed :— sometimes 'as blameable, sometimes as justifiable, sometimes as meritorious, or even an act of positive duty.

In this light suicide seems to have been viewed by the founders of the Hindoo Code, who condemn it in ordinary cases as forbidden by their religion; but in others, as in the well-known instances of *Suttee* and self-immolation under the car of *Juggernaut*, treat it as an act of great religious merit.

We think, therefore, the law under consideration inapplicable to Hindoos, and if it had been introduced by the Charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of Sir *Barnes Peacock* in this case; and if it were not so introduced, then as regards Natives, it never had any existence.

It would not necessarily follow that, therefore, it never had existed as regards Europeans. That question would depend upon this, whether, when the original settlers, under the protection of their own Sovereign, were governed by their own laws, those laws included the one now under consideration; whether an offence of this description was an offence against the King's peace, for which he was entitled to claim forfeiture; whether the Factory could for this purpose be considered as within his jurisdiction. In that case it might be that the subsequent appointment of Coroners by the Act of the 33rd Geo. III. would render effectual a right previously existing, but for the recovery of which no adequate remedy had been previously provided.

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We are not quite sure whether the Court below intended to determine this point or not. Much of the reasoning in the judgment is applicable to Europeans as well as to Natives, but the Chief Justice in his judgment says :—"At present we have merely to consider the question, so far as it relates to the goods and chattels of a Native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *felo de se* ; and we now proceed to deal with that question, and with that question alone " (a).

The point so decided we think perfectly clear, and it is not necessary to go further. Since the New Code, which confines the penalty of forfeiture within much narrower limits than existed previously to its enactment, and does not extend it to the property of persons committing suicide, the case can hardly again arise.

We have no doubt that it is our duty in this case, humbly to advise Her Majesty to dismiss the appeal, with costs.

(a) *Ante*, p. 400.

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# C A S E S

IN

## THE PRIVY COUNCIL

ON APPEAL FROM

### THE EAST INDIES.

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PRANNATH CHOWDRY ... *Appellant,*

AND

RANEE SURNOMOYE DOSSEE ... *Respondent.\**

*On appeal from the Sudder Dewanny Adawlut at Calcutta.*

IN this suit, the question was, whether the Appellant was entitled to a reduction of the sum of Rs. 714. 11s. *per annum*, on the fixed annual rent of Rs. 16,001, reserved to *Rajah Kistounauth Roy*, under two separate sets of instruments. The first set being

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A Zemindar granted his Zemindary by Pottah, or lease, as a Putnee Talook, at a fixed annual rent. Adjacent to the demised lands were other lands called Bheel Bhurrupees lands, to which the Zemindar had only a

\* Present: Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

*Assessors*.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

temporary interest, but which lands were included in the *Pottah*. The *Bheel Bhurrupees* lands were afterwards resumed by the Government under *Ban. Reg. II.*, of 1819, and assessed separately from the *Zemindary*, the *jumma* being paid by the lessee for a period of nine years. Held, in a suit brought by the lessees against the lessor's representative for remission of the rent paid on the resumed land, out of the fixed annual rent, that by the terms of the *Pottah* the *Bheel Bhurrupees* lands were not included in the fixed annual rent.

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a *Pottah*, or lease, of the Respondent's late husband, *Rajah Kistonauth Roy*, which created an hereditary *Putnee Talook*, and a corresponding *Kabooleat*, executed by the *Putneedar*, or lessee; and the second set, including a similar *Pottah* and *Kabooleat*, executed by the Respondent as *Zemindar* in succession to her husband, and the Appellant and *Cassinath Chowdry*, as purchasers of the *Putnee Talook*, and as such the assignees of the original *Putneedar*. The right to the reduction of the rent was contended for by the Appellant on the ground, that the Appellant and *Cassinath* had entered into a settlement with the Government Collector for the payment of the sum of Rs. 714. 11a. per annum, as Government revenue, in respect of a small piece of land, described as *Bheel Bhurruttee* land, previously only temporarily settled, and which settlement had expired by effluxion of time within less than a year of the dates of the first *Pottah* and *Kabooleat*. This new settlement, however, it appeared, was made voluntarily, and for their own benefit, by the Appellant and *Cassinath* previously to applying for the *Pottah* from the Respondent and executing the *Kabooleat*, by which they expressly undertook to pay to the Respondent, as *Zemindar*, the full amount of the fixed annual rents reserved by the original instruments, without any deduction whatever. There was a further question raised in the Court below, whether the Appellant was entitled to recover from the Respondent the gross sum of Rs. 7,861. 9a, with interest out of the fixed annual rent of Rs. 16,001, which the Appellant had paid under these instruments, for a period of nine years, previous to the time when the suit was brought. This sum of Rs. 7,861,

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was the aggregate amount of the payments of Rs. 714. 11a. *per annum*, charged by the Appellants on account of the Government revenue during the period of nine years and upwards. The *Zillah* Court decided the two points in favour of the Appellant, but without allowing interest, and the *Sudder Dewanny Adawlut* on appeal, reversed that decree on both points. Hence this appeal.

The following were the facts of the case :—

*Rajah Kistonaath Roy* was possessed of a 'hereditary *Zemindary*, called *Dehee Hajecpore Dehee, Nabudenttee*, &c., appertaining to *Pergunnah Boorun*, otherwise *Lockenathpore*, the annual Government revenue payable for which, under the permanent settlement, was Rs. 9,976. 8a. 4p., and was recorded as proprietor in the books of the Collector of *Zillah Nuddea*. It appeared that there was near or adjoining to the *Zemindary* a piece of 'reclaimed land, described as *Bheel Bhurruttee* (filled up), which was not included in the perpetually settled lands of the *Zemindary*, but subsequently assessed for a short fixed period, this piece of land was, under the ordinary proceedings taken on behalf of Government. This resumption took place while the *Rajah* was a minor, and thereupon his guardians entered into a temporary settlement with Government for the land, for a period of ten years, ending in the year 1251 B.E., corresponding with the year 1844-5 C.E. The revenue assessed by the Government officer, and made payable under that settlement, was paid separately from the Government revenue payable for the *Zemindary*, first by the guardians, and subsequently by the *Rajah*; and this payment was made, as it appeared, not into the Collectorate of *Zillah*



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*Nuddea*, where the Government revenue for this *Zemindary* was paid, but into the Collectorate of *Barasett* in the adjoining *Zillah* of the 24 *Pergunnahs*.

On the 18th of July, 1844, the *Rajah*, in consideration of Rs. 20,000, paid down, and an annual fixed rent of Rs. 16,001, exclusive of *Surunjamee* (collection expenses) and *Malikanah* (proprietor's maintenance allowance), reserved and made payable for ever to the *Zemindar*, gave to J. D. *Herklotts*, and his heirs, as a reward for past services as his manager, and beneficial lease of his *Zemindary* and *Zemindary* rights; and a *Pottah* was accordingly executed by the *Rajah* of that date, which created, and granted to *Herklotts* and his heirs for ever, a tenure called a *Putnee Talook*, of the *Zemindary*, recognized and sanctioned by Ben. Reg. VIII. of 1819, to be held and enjoyed by *Herklotts* and his heirs and assigns, subject to the payment of the above annual fixed rent to the *Zemindar*. This *Pottah* described the premises granted by the *Rajah* as a *Putnee Talook* :—as "My *Zemindary* in *Zillah Nuddea*, the *Sudder jumma* of which is entered at Co.'s Rs. 996. 8a. 4p. in the Collectorate of the *Zillah*, together with the *Modafat*, the *Mouzahs*, the entire *Zemindary* rights, with the settled *Churs* resumed *Chukeran*, *Khangee Lakhiraj Kureedgee* (purchased), *Dawuttur*, *Chuppur*, and *Backuppore* (inhabited and uninhabited), *Chuckbustee*, in possession and out of possession, movable and immovable, the whole of the *Mehals*, together with the lands settled under Reg. II." And the *Pottah*, after providing, that "whatever orders are in force, and such as may hereafter be issued from the authorities of the Collectorate, &c..

you will obey and act accordingly," concluded as follows :—"The *Zemindary* rights that I have in the *Dhees* (villages) aforesaid have been made over to you in *Putnee*; the boundaries of which, as they have existed in possession, you will preserve, and, paying the *Malguzaree*, you will continue to hold and enjoy from generation to generation."

The *Kabooleat*, or counterpart of the *Pottah* or lease was executed by *Herklotts*, followed entirely the *Pottah*, repeating only its provisions, with this addition, viz.:—"I will make *Furreep* (measurement) *Fummabundee* (assessment of rent payable by the *Ryots*) of the said *Mehal* (estate), and whatever excess (*i. e.*, of rent) may arise thereby shall be my right. The same will have nothing to do with you."

The *Rajah* committed suicide (*a*) whereupon the Respondent instituted a suit, in the Supreme Court in *Calcutta*, as his widow and heiress-at-law, claiming to be entitled to the estate and property; and she was put into possession of the estate and property of the *Rajah*.

Before this took place, and on the 7th of *December*, 1844, *Herklotts* entered into an agreement with the Appellant and *Cassinath* to sell to them the *Putnee Talook*, and all his rights under the *Pottah* and *Kabooleat*, for the sum of Rs. 42,815, and Rs. 11,000, of that amount was on that date paid to *Herklotts*, as earnest-money. The *Kubula* (instrument of sale) was executed by *Herklotts* on the 10th of *January*, 1845. That instrument set out the premises in the language of the before-mentioned *Pottah* and

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(a) See as to the effect of *felo de se*, the case of The Adv. Gen. of Bengal v. Ranee Surnomoye Dossee, *ante*, p. 387.

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*Kabooleat*, the agreement for sale and payment of the earnest-money aforesaid, as well as the payment of the balance of the purchase-money, viz —Rs. 31,815; and that *Herklotts* had on his part undertaken to put them in possession of the *Putnee Talook*, and to have the purchaser's name registered by the *Zemindar*, in the place of his own, as *Talookdars*; and that the latter would, on their part pay, according to the stipulations of my *Putnee Pottah* and the *Kabooleat Kistbundee*, Rs. 16,001, as *Malgusary*, to the *Rajah*, from year to year, and hold possession from generation to generation over the proceeds of the *Putnee Talook* aforesaid.

It appeared that the Appellant and *Cassinath* also got possession of the piece of *Bheel Bhurruttee* in the *Zillah* of 24 *Pergunnahs*, together with the lands granted to *Herklotts* in *Putnee*, situate in the *Zillah Nuddea*.

The temporary settlement of this piece of land being about to expire, a remeasurement of the same on the part of Government took place in the year 1251, when the same was set down at 1,340 *beegahs* 1 *cottah*; and on the expiration of the term of the Settlement, the Government Collector made a new settlement, on the basis of the last measurement, and accordingly assessed the lands in question at the rate of 8 *annas* 6½ *gundahs*, payable as Government revenue annually, *per beegah*, making the aggregate amount Rs. 7,114 11a. from which, however, was then deducted 12 per cent., on account of allowance for *Surunjames* (collection) and other expenses, leaving a fixed annual revenue of Rs. 628 14a. 16p., payable to Government, including the *Malikanah* of

Rs. 62. 14a. 8p. annually. It appeared, also, that on the application of the Appellant and *Cassinath Chowdry*, without communicating with the Respondent, as the heiress-at-law, or with the Court of Wards, a settlement was made with them by the Government Collector in respect of that piece of land, on the terms aforesaid, and for a settlement for a new term of ten years, commencing in the year 1252 B.E., and ending in the year 1261 B.E., and that, by such settlement, it was expressly provided that the *Ijardars* (farmers), should pay the *Malikanah* and should deposit the same in the Government treasury, having been calculated <sup>at first</sup> at the rate of 13 *per cent.*, being Rs. 81. 12a. 4p. *per annum*; but afterwards, on 10th of *March*, 1851, at the reduced rate of 10 *per cent. per annum*, making Rs 62. 14a. 3p, *per annum*, and that on the 17th of *June*, 1845, the Appellant and *Cassinath* without the privity of the Respondent, took an *Amulnamah Pottah*, or *Ijarah* (farming) lease of the *Bheel Bhurruttee* land from the Government, on the terms of the above settlement.

Subsequently, and in accordance with the provisions of *Ben. Reg.* VIII., of 1819, they, as purchasers of the *Putnee Talook*, applied to the Respondent, as heiress-at-law of her late husband, for a confirmation of the purchase and registration of their names in the *Zemindary* books, offering security for their due payment of the fixed annual rent of Rs. 16,001, in respect of their *Putnee Talook*.

Their names, as such purchasers, were accordingly registered in place of the *Herklotts*, in respect of the *Putnee Talook*, in the records of the *Zemindary* by the Appellant, on their executing the usual *Ikrar*

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*Kabdooleat* (agreement to pay rent). This *Ikrar Kabod-leet*, executed on the 20th September, 1849, had no reference to, and made no mention of, the piece of *Bheel Bhurruttee* land, or of the new settlement thereof.

In accordance with custom, a *Pottah* of confirmation was executed and delivered by the Respondent to the parties, on the 19th of October, 1849. That *Pottah* recited the *Ikrar Kabooleat*, and concluded as follows:—"It is necessary that you, considering yourselves confirmed as *Putneedars* of the *Mehals* above mentioned, according to the stipulations of your respective *Kabooleats* and *Ikrars*, remain in possession of the *Mehals*, and enjoy the same, and that you, from month to month, and *Kist* to *Kist*, according to *Kistbundee*, pay the rent due from each, and in nowise depart from the *Kabooleats* and *Ikrars* given by you separately."

From the dates of the *Pottahs* and other deeds respectively, to the filing of the plaint in the suit, the Appellant and *Cassinath* paid to the Respondent, without making any objection, or protest in performance of their covenant in that behalf contained in their *Ikrar Kabooleats*, the fixed annual rent of Rs. 16,001, according to the prescribed instalments in the *Kistbundee*. And also paid into the Government treasury for the Respondent, the sum of Rs. 62. 14a. 3p. per annum, *Malikanah* allowance, together with the amount of Government revenue—Rs. 566. 0a. 7p.—making together the sum of Rs. 628. 14a. 10p., so reserved and made payable by them as such farmers of the piece of *Bheel Bhurruttee* land under the new settlement with the Government, without any objection on

their part, and it was not until the plaint hereinafter mentioned was filed, that any intimation was conveyed to the Respondent, that the Appellants considered themselves entitled to claim any deduction from the fixed annual rent of Rs. 16,001, on the ground of their having entered into the new settlement, and thereby undertaking to pay revenue in respect of that piece of *Bheel Bhurruttee* land.

The suit out of which this appeal arose was commenced by the Appellant and the others in the *Zillah* Court of the 24 *Pergunnahs*. The principal facts above set forth appeared in the plaint; which sought to recover the gross sum of Rs. 11,692. 4a. 13p., on account, as the Plaintiffs alleged, of rent twice paid, being the sum of Rs. 714. 11a., from the year 1252 to 1260 B.E., a period of nine years and five months, and it prayed that such sum of Rs. 714. 11a. might be deducted from the fixed annual rent of Rs. 16,001, of the *Putnee Talook*, and that the sum of Rs. 15,286. 5a. be fixed as the annual *jumma* of the *Putnee Talook*. The plaint did not allege that the Respondent was ever applied to by the Plaintiffs to enter into the new settlement with Government in respect of the piece of *Bheel Bhurruttee* land, or that there was any undertaking on the part of her late husband, that he or his heirs would do so.

The answer of the Respondents denied the right of the Appellants to recover, stating the circumstances under which the *Putnee Talook* was granted to *Herklotts*, and denied that the instruments creating the *Putnee* included, or that it was the intention of the *Rajah* and *Herklotts* to include, the *jumma* of the resumed lands within the permanent *jumma* of the *Putnee* tenure,

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and the answer submitted to the Court that the Appellants were not entitled to recover the principal moneys claimed; and that, in any case, interest was not payable.

The suit being at issue the original *Putnee Pottah* and *Kabooleat* executed by the late *Rajah* and *Herklotts* respectively; the *Kubbala*, executed by *Herklotts* in favour of Appellant an *Cassinath*; the *Pottah* of confirmation executed by the Respondent were put in evidence.

The Respondent filed, as evidence, the *Kabooleat* executed by the Plaintiffs to the Respondent, containing their covenant, binding themselves to pay in full without deduction, the fixed rent of Rs. 16,001, expressly reserved by the Respondent's *Pottah*, and applied that the Appellant and *Cassinath* might be examined, which the Court refused.

The hearing of the suit took place before Mr. J. S. *Torrens*, the Judge of the *Zillah 24 Pergunnahs*, on 6th of *August*, 1855, and his decree was made on the 19th of *September*, 1855, in favour of the claim of the Plaintiffs; the material part of this decree was as follows:—"On consideration, as it appears that the Plaintiffs have been obliged to pay *jumma* twice over on their *Putnee*, owing to Defendant not fulfilling her part of the contract as far as in her power, I give a decree for the deduction; but as the claim must be calculated according to the engagement as exchanged at the time the *Putnee* was constituted, I deduct from this the *jumma* on the thirty-five *beegahs* measured in excess of the settlement as existing when the *Putnee* was given; also the *Surrunjamee* allowed to Plaintiffs by the Collector, viz., Rs. 83. 8a. *per annum*

on the *jumma* paid, the deduction henceforward from the *Putnee jumma*, and the refund on past collections to be calculated accordingly, subject to Defendant having a right to demand at any time from Plaintiffs the right of entering herself into settlement as *Zemindar*, and in doing so, receiving the original *Putnee jumma*; "such arrangement being in conformity with the object of the prayer of the plaint, which is only to avoid double payment. It does not appear either that the plaint sets forth that the demand for restitution was made to the *Rance* before the institution of the suit, and I, therefore, do not allow interest previously accruing; only that from date of the action. Costs to be modified accordingly."

The Respondent appealed from this decree to the *Sudder Dewanny Adawlut*, on the merits and on the special ground, that the Judge had refused to take the evidence of the Appellant and *Cassinath*. The Appellant also appealed against the decree, so far as it did not give interest on the claim.

The hearing of the two appeals came on before the full Bench of the *Sudder Dewanny Adawlut*, consisting of Messrs. *C. B. Trevor*, *G. Loch*, and *H. V. Bayley*, on the 30th of *April*, 1858; when the Court reversed the decree of the *Zillah* Judge, and delivered the following judgment:—"After giving our best consideration to the arguments of the Pleaders and the circumstances of the case, we are of opinion, that neither the terms of the lease generally, nor the special words relied on, 'settled *Churs*,' and 'lands settled under Reg. II., of 1819,' include, or can be fairly construed to include, the lands in suit. The lease is definite and distinct throughout as to its

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being a lease for *Mehal Dehee Hajee poor* and *Dehee Nabudcuttee*, in *Zillah Nuddea*, paying a *jumma* there of Rs, 9,996. 15a. 8p. The 'settled *Chur*,' and 'lands settled under Regulation II.,' and the other supplementary definitions of what is included in the lease, refer to the appurtenances of the *Putnee Mehal*, with its above *jumma*, as paid into the *Nuddea* Collectorate; and to no separate *Mehal*, such as *Bheel Bhurruttee* lands in suit. We observe that the *Zillah* Judge refers to the admission made by the Defendant as to *Herklots* having received these lands along with his *Putnee*; but this is not so. The words in the answer are, that such rights in the *Bheel Bhurruttee* as the *Rajah* had, were given to *Herklots*. But those rights were merely those of settlement, and we cannot see that there is any admission here that the *Bheel Bhurruttee* lands formed part of the *Putnee* lease. We further observe, that the revenue of the *Putnee Mehal* was paid into the *Nuddea* Collectorate separately, and that of the *Bheel Bhurruttee* lands into the Twenty-four *Pergunnahs* Collectorate separately; that the Plaintiffs got possession simultaneously of the *Putnee Mehal* and separate *Bheel Bhurruttee* land; that the Plaintiffs paid the rents of the *Putnee* and *Bheel Bhurruttee* independently and separately, for nine years and more without protest, although they had full and obvious occasion for making such protest when they registered themselves as *Putneedars* in the *Zemindary Sherishta*, and when they received the farming lease of the lands in suit. These facts show an acquiescence by Plaintiffs, which affords a strong legal presumption that the lands in suit were not included in the *Putnee* lease. Under these circum-

stances, it is needless to give our opinion at any length as to the evidence of Defendant's witnesses. We deem it, however, in itself vague and unsatisfactory as to the point of the parties intending and speaking of the intention that the lands in suit should be considered included to the *Putnee*, and insufficient of itself to rebut the evidence to the contrary afforded by the terms of the deed and the facts of the case. We, therefore, reverse the decision of the Judge in the appeal, No. 157, and decree the appeal, with costs, on the Plaintiffs. In the appeal No. 158, in which *Prannath Chowdry* appeals on the point of interest, we dismiss his appeal as a necessary consequence of our judgment in the foregoing case, with costs."

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The *Sudder* Court refused leave to appeal, but upon special petition leave was granted by the Judicial Committee (a).

Mr. *Rolt*, Q. C., and Mr. *W. M. Jervis*, for the Appellant, in support of the appeal,

Contended that the resumed lands in question were originally appurtenant to and included within the *Zemindary* of *Rajah Kistonaath Roy*, and that the lands were resumed and a summary settlement made under *Ben. Reg. II.*, of 1819, with the guardians of the *Zemindar* for ten years from *April*, 1835, to *April*, 1845, and the *Putnee Pottah* of the 18th of *July*, 1844, expressly included the lands settled under that Regulation, and bore date before the settlement made with the guardians of the *Zemindar*

(a) See case reported upon this point, 7 Moore's Ind. App. Cases, 553.

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had expired. That the subsequent instruments in like manner included the lands so settled under that Regulation, and insisted that there were no other lands settled under the Regulation to which the *Putnee Pottah* and other instruments could refer. That even if the resumed lands were in any way referred to as the *Putnee Pottah*, there was no reasonable grounds for contending that such *Pottah* comprised only the *Zemindary* right to a settlement with Government in respect thereof, and did not comprise the land itself as covered by the purchase money and annual *Putnee jumma*. That the acts of the Respondent and the deceased *Zemindar*, whom she represented, were consistent only with such a construction of the *Pottah*. And they further contended, that the payment of the Government *jumma* of the resumed lands into the Collectorate of the Twenty-four *Pergunnahs* and not into the Collectorate of *Nuddea*, was a mere fiscal arrangement, which could not affect the construction of the contract between the parties.

The Solicitor-General (Sir R. Palmer) and Mr. Leith, appeared for the Respondent, but were not called upon.

The Right Hon. Lord KINGSDOWN:

Their Lordships are of opinion that this case is perfectly clear,—and that there can be no doubt that the judgment of the *Sudder Court* must be affirmed.

The *Rajah* held the *Zemindary* at a *jumma* rent of nearly Rs. 10,000, he sells the *Zemindary* to a purchaser for Rs. 20,000, and a *jumma* rent of Rs. 16,000.

In addition to the *Zemindary*, which he held in perpetuity, there were certain lands which were added

by accretion to the *Zemindary*, which he held for a term of ten years at a *jumma* rent, which a right of renewal, more or less defined, but at all events with some preferential rights.

In that state of things he sells his *Zemindary*, and says nothing about the other lands. What does he sell then? He sells, of course, the interest he had; he sells the perpetual interest he had in the lands he held in perpetuity, and he sells the interest he had in the lands he held for ten years for the remainder of that term. At the time the sale is made, it appears that there were only ten months of that term to run. The *jumma* was a simple one, and it was not necessary to mention the rent for that *jumma* in the contract. The expiration of the term, namely, at the expiration of the ten months, the purchaser asks a renewal of the term. He has the right of renewal, or the right of throwing up the lands, but he has no contract or engagement with the vendor that will run for his benefit; but he makes a renewal, and he makes a renewal by which he engages to pay a certain rent, he continues to pay a certain rent to the Government, and, having engaged to pay that rent, he continues to pay it for nine years, and then he and others, institute a suit for the purpose of obtaining repayment of what he has thus paid, insisting that he was entitled to it, and asking to have deducted out of Rs. 16,000, which he had engaged to pay to the *Ranee*. He had obtained by some reason or other a renewal of the grant from the *Ranee*, and in it he stipulates for payment of Rs. 16,000, *per annum*, from which he now says Rs. 714. 11s. are to be deducted.

• Their Lordships are satisfied that there is no ground

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for the claim, and will advise Her Majesty to dismiss the appeal with costs, as the appeal in their opinion was groundless.

THE COLLECTOR OF MADURA ... *Appellant*,

AND

VEERACAMOO UMMAL ... *Respondent.\**

*On appeal from the Sudder Dewanny Adawlut at Madras.*

30th June,  
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Suit by Government for possession of the *Polliam* of *Erasaca Naiknoor* in *Madras*, as an escheat for want of male heirs, dismissed. The Government having acquiesced in the right of female succession to the *Polliam*, and possession had for a period of eighteen years after the alleged escheat.

IN this case the appeal was brought from a decree of the *Sudder Dewanny Adawlut* at *Madras*, by which decree the Appellant, as sole surviving heiress of her deceased father, was declared entitled to the *Zemin-dary* of *Erasaca Naiknoor*, with mesne profits.

The facts of the case were these:—

In the year 1802, *Mooltalagari Naker* was put into the possession as *Polligar*, of the *Polliam* of *Erasaca Naiknoor*, by the Government, upon condition of payment of tribute, and other condition specified

\* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Females are not precluded by any rule of descent, custom, or usage of the *Cumbal: Tottier* caste, from succeeding to a *Polliam*.

in the *Mooschilka* executed by *Mooltalagari Naiker*, dated the 17th of *December*, 1802. It did not appear that any *Sunnud i-Milkeut Istimrar* had been granted by the Government of the *Polliam* in question.

*Mooltalagari Naiker* died on the 9th of *December*, 1814. Upon his death the Government did not assume possession of, or interfere with the *Polliam*, but the same remained in the charge of *Ellappa Mudali*, the Manager who had conducted the affairs of the *Polliam* during the lifetime of *Mooltalagari Naiker*, for the benefit of his son, *Chinnobola Naiker*, who became the *Polliagar* of *Erasaca Naiknoor*. *Chinnobola Naiker* died in the year 1835, without male issue, leaving two widows, named *Chinnammal* and *Papammal*, by the latter of whom he left one daughter, the Respondent, *Vseracamoo Ummal*. Shortly after the death of *Chinnobola Naiker*, one *Shuckama Naiker*, who had entered upon the management of the affairs of *Erasaca Naiknoor Polliam*, claimed to be entitled thereto as the nearest male heir of *Chinnobola Naiker*; whereupon the two widows presented a petition to the Board of Revenue, praying to be put in possession of the *Polliam*; and an Order having been passed by the Board, granting the prayer of the petition, the Collector of *Madura* issued a *Sunnud* on the 4th of *April*, 1836, putting them in possession.

Disputes arose between the widows as to the joint enjoyment of the *Polliam*; and, in *December*, 1836, *Papammal* filed a plaint in the Court of the *Sudder Ameen* of *Madura*, against *Chinnammal* and five other Defendants, for the recovery of half the value of the produce of the *Polliam*. The *Sudder Ameen* made a decree in favour of *Papammal*, and from that decree *Chinnammal* appealed to the

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*Zillah Court of Madura.* After putting in her answer, *Papammal* died. The *Zillah Court* pronounced judgment on the appeal on the 4th of *December*, 1839, and thereby determined that *Chinnammal*, as the sole surviving widow of the late *Zemindar*, should remain in full possession of her husband's *Zemindary* and other immovable property; and that, after her death, the deceased widow's only daughter, the Respondent, was the sole heiress.

On the 29th of *October*, 1841, *Shuckama Naiker* instituted a suit in the Court of the Subordinate Judge of *Madura*, against *Chinnammal*, whereby he claimed the *Polliam* as an undivided cousin and nearest male heir of the late *Chinnobola Naiker*; and a decree was made in that suit in his favour by the Subordinate Judge. Against that decree an appeal was brought by *Chinnammal* to the *Zillah Court of Madura*; and on the 15th of *December*, 1848, that Court reversed the original decree, and nonsuited *Shuckama Naiker*.

*Chinnammal* leased the *Polliam* to *Chockalinga Pillay*, in the year 1848, for a term of nine years.

On the 12th of *July*, 1853, *Chinnammal* died, and upon her death the Respondent, and *Radurasawmy Naiker*, the son of *Shuckama Naiker*, then deceased, put in their several claims to the *Polliam* of *Erasaca Naiknoor*, and severally claimed to be put in possession thereof by the Collector of *Madura*. The Respondent's title was founded upon being the granddaughter of *Chinnobola Naiker*, and upon the before-mentioned two decrees of the *Zillah Court of Madura*, made upon appeal. *Radurasawmy Naiker* grounded his claim on the fact that *Chinnobola Naiker*, the last male *Polligar*, was of the *Cumbala Tottier* caste,

and the custom in that case, by which he insisted, females were excluded from succeeding to a *Polliam*, and relied on certain declarations alleged to have been made by *Chinnobola Naiker* in favour of his branch of the family.

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The then Collector of *Madura* made a report to the Board of Revenue, dated the 6th of *September*, 1853, upon the respective claims to the *Polliam*, and reported that it had escheated to the Government. He, at the same time, drew attention to the fact of the lease by *Chinnammal* to *Chockalinga Pillay*, and recommended that, as the conditions of the lease had been performed by the lessee, it should stand ratified and confirmed for the period which then remained unexpired; and he also submitted for consideration, whether, in the case of the property being declared to have escheated, a pension should be granted by the Government to the Respondent.

In the year 1854, proceedings were taken by the Respondent in the Court of the Subordinate Judge and in the *Zillah* Court of *Madura*, with the view of obtaining a precept in the execution of the before-mentioned decree of 1848, on appeal, requiring the Collector to, place her, as the daughter and heiress of *Papammal*, in possession of the *Polliam*. Those proceedings resulted in an order of the *Zillah* Court, directing that the *Polliam* should be delivered over to the Respondent. Upon appeal to the *Sudder Dewanny Adawlut*, however, the Order of the *Zillah* Court was, on the 26th of *February*, 1855, set aside, upon the ground, that the Collector was in possession, and was not a party to the suit in which it had been decided that the *Polliam* should go to the Respondent upon the death of *Chinnammal*.



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The Government shortly afterwards declared that the *Polliam* of *Erasaca Naiknoor* had escheated by the failure of male heirs.

In consequence of which, the Respondent, on the 2nd of *January*, 1856, instituted the present suit in the Civil Court of *Madura*, against the Collector of *Madura* and three other Defendants, one of such three Defendants being the adopted son and heir of *Chockalinga Pillay*, and the other two Defendants being sub-lessees of portions of the *Polliam* by virtue of leases from *Chockalinga Pillay*. By the plaint the Respondent prayed for a decree awarding to her the *Polliam* of *Erasaca Naiknoor*, together with the mesne profits, amounting to the sum of Rs. 113. 13a. 7p.

The Collector of *Madura* by his answer insisted, first, that according to the custom of the *Cumbala Tottier* caste, to which he alleged the Respondent belonged, females were not competent to succeed to a *Polliam*, and secondly, that the enjoyment of the *Polliam* by *Chinnammal* and *Papammal* was merely permissive on the part of the Government, and that the Respondent could derive no title as against the Government from a decision in a suit in which the Government was not a party. The second Defendant, by his answer, insisted upon the validity of the lease from *Chinnammal*. The other Defendants did not appear.

The Respondent put in evidence a decree of the Southern Provincial Court, in a suit, No. 10 of 1824, concerning the possession of a *Zemindary*, called *Sandayoor*, by which it was decided that the widows of the late *Zemindar* were entitled to that *Zemindary*; and examined three witnesses with reference to the custom of females of the *Cumbala Tottier* caste succeeding to a *Polliam*.

The evidence adduced by the Collector was solely documentary, the chief of which consisted of copies of answers from *Zemindars* of the District in which *Erasaca Naiknoor Polliam* was situate (one of them being the copy of answers given by *Chinnobala Naiker*, the last *Polligar* of *Erasaca Naiknoor*), with respect to the succession to their respective *Polliams*. These answers were given at the request of the Government, and were to the effect, that females were debarred from inheriting landed property. A letter to the Board of Revenue from the Collector of *Madura*, dated the 31st of *January*, 1804, with respect to *Zemindaries* to which females could not succeed, was also put in.

After great delay arising from the sickness of the former Collector of *Madura*, as the suit had not then come to a hearing, the then Collector, on the 11th of *February*, 1859, presented a petition to the Civil Court, praying the Court to reopen the case and examine his witnesses, and allow him to file documents in support of the statement in the answer that no female of the *Cumbala Tottier* caste could succeed to a *Polliam*, and by such petition he submitted, that the right decision of that question was of grave importance, not only to the Government, but to the numerous *Polligars* of that caste in the South of *India*. The Civil Judge, however, on the 14th of *February*, 1859, passed an order refusing the application.

The officiating Civil Judge, Mr. *R. R. Cotton*, pronounced judgment on the merits on the 30th of *March*, 1859. The material part of his judgment was in these terms:—"In the present case it appears clear, that the Plaintiff has been declared the heir and successor to her father's estate after the death of

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her stepmother, *Chinnammal*, and that though the first Defendant, on the plea that it was not usual for females to succeed to estates, has prevented her being put in possession of the *Erasaka Naik-noor Polliam*, he has entirely failed to show that such custom has either the force of law, or is acted up to; on the contrary, he admits in opposition to it that females have been, by order of the Revenue Board, and with his sanction, for the last eighteen years, in enjoyment of this very estate, while the Plaintiff has shown a like enjoyment by females of *Sandayoor* estate since 1824. With regard to the first Defendant's arguments, that the decree in appeal, No. 20, of 1838, cannot affect the present suit, inasmuch as the Plaintiff was not a party to it, or the estate the property litigated for, the officiating Civil Judge considers them erroneous; it is evident that the Plaintiff on the death of her mother became a party to the suit, as appears from the questions put to the Pundits, and their answer in that case, and that although the suit was brought for recovery of a sum of money, the proprietary right to the estate was the basis on which the suit was brought. As regards the claim made against the second Defendant, as the lease was continued and endorsed by the first Defendant, he must be considered the responsible party. The second Defendant pleaded, that the profits were too highly calculated, and was directed to show this; he filed eight exhibits, receipts for money, which, however, do not disprove the claim of the Plaintiff, whose documentary evidence supports it. It is difficult to reconcile the fact of the first Defendant ignoring the late *Chinnammal's* right to the estate, and his acknowledging and endorsing an agreement made by her (though at most a life

tenant) extending over seven years, and four beyond her decease. Under the above circumstances, the officiating Civil Judge considers that the Plaintiff is entitled to a verdict, and he, therefore, decrees, that the first Defendant do make over to her, as sole surviving heiress of her deceased father, the estate of *Erasaca Naiknoor*, and do also pay her the mesne profits sued for, and all her costs in this suit. The first and second Defendants will each pay their own costs."

From this decree the Appellant appealed to the *Sudder Dewanny Adawlut* at *Madras*, and that Court, consisting of Messrs. *T. L. Strange* and *H. Frere*, on the 10th of *July*, 1860, pronounced the following decree — "The Court is of opinion, that the first Defendant is precluded from challenging the succession of females to the estate in issue by the act of the Revenue Board, representing the Government, in installing *Chinnammal* and *Papammal* as the legitimate heirs of the previous *Polligar*, a condition of things that was kept up unchallenged until the death of the survivor of the widows, eighteen years afterwards. It has not been shown that this recognition of the widows was made under any limitation, or reservation. It must be taken, therefore, to have been absolute. It is urged that *Polliams* of the description of that in question, namely, not assured by *Istimirar Sunnud*, are not hereditary, but are held at the will of the Government, who on each lapse may appoint thereto whom they please. The plea, the *Sudder Court* notice, was not advanced in the Court below. The plea there urged was, in fact, inconsistent therewith. It was there contended, that the estate had fallen to the Government by escheat from lack of heirs, implying,

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therefore, clearly that, had there been an heir, that person would have been entitled to the property. The plea is also inconsistent with the installation and recognition by the Government of *Chinnammal* and *Papammal* as heirs of the preceding *Polligar*, and with the allegation that the Plaintiff's pretensions are to be negatived, not because such is the will of the Government, but, as she is a female, a certain rule, being a rule of descent, being urged against her. The Court declines to entertain a plea thus urged upon them, not only novel in its nature, but inconsistent with the former pleadings upon which the defence has been based. The Court do not view the decrees cited by the Civil Judge as declaring the Plaintiff's heirship to be conclusive against the Government, who were no parties to the suits in which they were given, but it being clear that on the demise of *Chinnammal*, without personal heirs, the estate reverts to the line of her husband, whose daughter the Plaintiff is, it is apparent to them that the Plaintiff is the next entitled to succession. The Court, finding no ground for interfering with the decree of the Civil Judge, dismiss this appeal with costs."

The present appeal was from this decree,

As the Respondent did not appear the appeal was heard *ex parte*.

Mr. *Forsyth*, Q. C., and Mr. *W. H. Melvill*, for the Appellant, contended,

First, that by the rule and custom of the *Cumbala Tottier* caste, to which the *Polligars* of the *Polliam* of *Erasaca Paiknoor* belonged, no female could succeed to the *Polliam*, and the Respondent,

therefore, had no title, and further that, at the death of the last male possessor in 1835, in default of male issue, the *Polliam*, which was not assured by *Istimirar Sunnud*, escheated to Government, although the Government permitted the widows the enjoyment thereof for their lives.

Secondly, that there had been a miscarriage of justice, as evidence to prove the rule and custom of succession to the *Polliam*, which had been tendered to the Civil Court of *Madura*, before the hearing of the suit, had been refused, and it was submitted that on that ground the case should be remitted to *India* to take further evidence.

Their Lordships, after observing upon the delay on the part of the Government in asserting their claim to the *Polliam* by escheat for the want of male heirs, and the evidence as to the custom and usage for females to succeed to the *Polliam* in question adduced by the Respondent, expressed their opinion, that the judgment appealed from was perfectly right, and dismissed the appeal, with costs.

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COLLECTOR  
OF MADURA  
v.  
VEERACAMOO  
UMMAL.

GHOOLAM MOORTOOZAH KHAN BA- } *Appellant,*  
 HADOOR, &c. ... }

AND

THE GOVERNMENT, representing the }  
 estate of the late NABOB of } *Respondent.\**  
 the CARNATIC ... }

*On appeal from the Supreme Court at Madras.*

15th & 16th  
 June, 1863.

THIS appeal was brought from such part of an Order of the Supreme Court at *Madras*, made in the matter of a claim of the Appellant, *Ghoolam Moor-*

Act, No. XXX. of 1858, of the Legislative Council of *India*, for the administration of the estate, and payment of the debts of the late *Nabob* of the *Carnatic*, empowered

\*Present: Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

the Supreme Court of *Madras*; to investigate in a summary manner, claims against the *Nabob's* estate. Held, that the provisions of that Act not only limited the extraordinary remedy which it gave to certain defined classes of debt, but threw upon a Claimant more than the ordinary burthen of proof; by compelling the holder of any written acknowledgment, or security, to prove the actual consideration given for it; and upon those claiming the price of the goods delivered, proof of the fair and actual value of such goods.

It is not the practice of the *Judicial Committee* to disturb the finding of the Court below upon mere issues of fact, unless their Lordships are clearly satisfied that there has been some miscarriage, either in the reception, or in the appreciation, of evidence.

In cases that turn upon the credibility of the testimony given, the appellate Court is disposed to defer to the judgment of the Judges who, with the advantage of local experience, have had the means of seeing the witnesses under examination, and of inspecting the original documents.

*toozah Khan Bahadoor*, as a creditor of the estate of the late '*Nabob* of the *Carnatic*, as did not allow certain sums of money and interest claimed by him against the *Nabob's* estate.

The *Nabob* and his family, under the provisions of the Treaty by which the territory of the *Carnatic* was ceded to the British Government, was by Act of the Legislative Council of *India*, No. 1. of 1844, exempted from process of the ordinary Courts of Justice in *Madras*.

The last *Nabob* of the *Carnatic* died on the 7th of *October*, 1855, leaving debts and liabilities to a large amount unsatisfied, some of which were contracted by himself and some by *Aseem Jah Bahadoor*, as *Nabob* Regent, or *Naib-i-Mooktar*, during the infancy of the late *Nabob*.

By an Act of the Legislative Council of *India*, No. XXX. of 1858, provision was made for the appointment of a Receiver for the administration of the estate of the *Nabob*, and with respect to the satisfaction of all such debts as should be proved to have been fairly and justly contracted by the *Nabob*, or on his behalf, during his minority by *Aseem Jah Bahadoor*, as *Nabob* Regent. Section 14 of that Act enacts, that "Any person claiming to be a creditor of the said late *Nabob*, who, within the period of three months from the passing of this Act, shall file in the office of the Registrar of the said Supreme Court (at *Madras*), a written declaration, stating that he is willing to receive in full discharge of all his claims against the said late *Nabob*, or any property to which the said late *Nabob* at the time of his death was entitled, either at law or in equity, or which is liable either at law or in equity to satisfy the debts of the *Nabob*, such amount as shall be

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ascertained by the said Supreme Court to have been justly and fairly due to him from the said late *Nabob* at the time of his death, or to be a charge upon such property, and to remain unpaid (the amount to be estimated in respect of moneys at the amount which shall be proved to have been actually advanced to or paid for the use of the said *Nabob*, and in respect of goods supplied or other matters at the amount which shall be proved to have been the fair and actual value thereof at the time when such debts were incurred), together with such interest (if any) not exceeding the rate of six per cent. per annum, as shall be awarded by the said Court; and that he is willing to give up any mortgage or security which he may hold upon any part of such property as aforesaid, or which shall have been charged with the debt,—shall be entitled, upon giving such mortgage, or security, to the said Receiver, to have the amount of his claim ascertained by the said Court, in manner hereinafter mentioned.”

Section 22 of the same Act, so far as the same is material in this case, was as follows :—“ Upon the day so fixed, or upon any other day to which the Court may think fit to postpone the investigation, the Court, after proof of the service of the notice required by section 19 of this Act, shall proceed to ascertain and determine, in a summary way, what amount is justly and fairly due from the estate of the said *Nabob* at the time of his death to the Claimant, whether the debt be payable by instalments or not, and whether or not the day or days fixed for the payment thereof shall have arrived. In ascertaining such amount the said Court shall not allow to any person claiming to be a creditor in respect of money lent or advanced, any larger sum than the amount which shall be

proved to have been actually advanced to or for the said late *Nabob*. \* \* \* \* "

It appeared from the evidence adduced before the Supreme Court in support of the Appellant's claim that the Appellant was the nearest male relative of the late *Nabob*, and many years older than the *Nabob*, and, having been associated with him from his early childhood, was upon terms of the greatest intimacy with him; that he had been brought up by the *Nabob's* grandmother, commonly called the *Nabob Begum*, and was the intimate friend and confidential agent of the *Nabob Begum*; and also of the *Nabob's* mother, *Ennayet Oonissa Begum*, commonly called *Bhow Begum*; that prior to the year 1843, the Appellant received from the two *Begums* gifts of houses and other property, and also large sums of money, to the amount of about 4 *lacs* of Rupees; but in consequence of his extravagance, he was obliged to take the benefit of the Indian Insolvent Act in July, 1843; that subsequently to that period, the Appellant was constantly employed by the young *Nabob*, who had been installed in August, 1842, in obtaining loans of large sums of money for him through money-lenders; and there appeared to have been numerous confidential pecuniary transactions between the *Nabob*, his mother and grandmother, and the Appellant; that in the year 1848, the *Nabob*, being involved in debt, established an office called *Istafa Cutcherry*, or an office for the settling of account; and from that office Bonds were issued in settlement of accounts ascertained to be due, such Bonds bearing or not bearing interest, according to the terms thereof; that shortly after the establishment of the *Istafa Cutcherry*, the Appellant sent in a document, purporting to be an

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account of balances due to him; but, inasmuch as such account was a mere abstract, without any particulars, and the particulars, though demanded, were never obtained from the Appellant, his account was not settled, as were the accounts sent in by other persons, and the same remained unsettled at the time of the death of the *Nabob* in 1855; that the *Nabob's* mother died some time before the month of *May*, 1849; the *Nabob's* grandmother in the year 1857; and the mother of the Appellant about the same time.

On the 19th of *November*, 1858, the Appellant filed a written declaration, in the terms prescribed by section 14 of the Act, No. XXX., of 1858, in the office of the Registrar of the Supreme Court, and thereby claimed to be a creditor of the late *Nabob*. Notice of such declaration was subsequently given to the Solicitor of the Government at *Madras*, together with the particulars of his claim, filed by him, and showing as due to him from the *Nabob's* estate, upon a balance of account, the sum of Rs. 13,50,958 8a. 7p.

The particulars of claim consisted of two parts; and in the first part—the items in respect of which a claim for principal and interest was made—were described as follows:—1st item. “1846, *January* 10.—To cash deposited by this Claimant's mother with *Ennayet Oonissa Begum*, the mother of the late *Nabob*, prior to the date, which money was admitted by the late *Nabob* to be due and payable by him to this Claimant, in a letter addressed to this Claimant, written by his order, and signed by *Salar-ool-Moolk*, his private secretary, dated the 11th day of *Shaban*, 1271, the original of which is filed herewith. This Claimant is unable, as he does not know when

these moneys were paid, to give the dates of the payments; but, on this 10th of *January*, 1846, the late *Nabob* executed and delivered to this Claimant's mother a bond for Rs. 7,00,000, payable to Mr. *J. Arathoon*, or order, which bond was given to this Claimant by his mother, and was delivered up by this Claimant to the *Istafa Cutcherry*, on or about the 1st *September* 1851, Rs. 9,00,000." 2nd item. "1847, *September* 1.—To each lent on or about this date by this Claimant's mother to the said *Ennayet Oonissa Begum*, the mother of the late *Nabob*, in cash; which money the late *Nabob* promised to repay to this Claimant, with interest at 6 per cent., by monthly instalments of Rs. 2,000. Rs. 1,00,000." 3rd item. "1841, *September* 1.—To cash paid by the grandmother of the late *Nabob* of the *Carnatic* to his the *Nabob's* mother, in trust to pay the same to this Claimant as a gift, Rs. 2,00,000."

In the second part of the particulars, the items in respect of which a claim for principal and interest was made, were described as follow;—1st item. "1847, *January* 1.—To cash paid by this Claimant to the late *Nabob* of the *Carnatic* himself, prior to the date, the dates and particulars of which he is unable to give; but, in 1847, the Claimant furnished an account, containing this item, to the *Istafa Cutcherry*. Rs. 43,462." 2nd item. "1855, *March* 5.—To cash paid by this Claimant on this date to the late *Nabob* of the *Carnatic* of his use, in cash, Rs. 70,475. 4a. 6p."

The Claimant was examined and many documents were adduced by him, of which those principally relied on in support of the first item, were, in substance, as follow:—A memorandum in the handwriting of the late

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*Nabob*, being an account of loans received by the *Nabob* from his mother, from *January* to *July*, 1843, such loans amounting in the aggregate to Rs. 6,26,132. A document, purporting to be an account of moneys deposited by the mother of the Claimant with the *Nabob's* mother, and showing Rs. 2,50,000, so deposited in *September*, 1842, and Rs. 4,50,000, in *January*, 1843—total Rs. 7,00,000—and also purporting to comprise an account of the amount borrowed by the *Nabob* out of that sum, setting forth Rs. 6,27,132 as the amount so borrowed prior to *August*, 1843, and showing Rs. 72,868, as since borrowed up to *January* 1844, making together the whole sum of Rs. 7,00,000. A document, purporting to be an account of the moneys borrowed by the *Nabob* between *January* and *April*, 1844, to the amount of Rs. 2,00,000, out of a sum of that amount stated to have been deposited by the Claimant's mother with the *Nabob's* mother, on the 22nd of *January*, 1844. A document purporting to be an account of the moneys deposited by the Claimant's mother with the *Nabob's* mother, and showing Rs. 2,50,000, so deposited in *September*, 1842, Rs. 4,50,000, on *January* 7, 1843, and Rs. 2,00,000, in *January*, 1844—total Rs. 9,00,000. With respect to the last three documents, no evidence was adduced to prove when or by whom they were written. Though they were found among a miscellaneous collection of papers in a bundle brought from the *Nabob's* palace it was urged by the Government that they were open to considerable suspicion, from the fact of the late *Nabob's* records having been kept in boxes, or bags, which had not, since the death of the *Nabob*, been securely

protected, and were accessible to many persons; and also from the fact of their not having been known to exist by the Officers of Government before the hearing of the claim, although such Officers had been for some time engaged in investigating the claim, and had required all documents bearing thereon to be produced. Another document, called "Memorandum of the account of balances down to the 31st day of *December*, in the year of Christ, 1847," alleged to have been submitted for settlement by the Claimant to the *Istafa Cutcherry* shortly after its establishment, which contained the following, amongst other, items:—"The former balance, without any document, Rs. 2 *lacs*." A document, written on the 10th of *January*, 1846. "The limited time for repayment is the 31st of *December* of the said year, for Rs. 7 *lacs*." A petition of the Claimant to the *Nabob*, having reference solely to the fact of the *Nabob* having mortgaged the house in which the Claimant resided. A Letter from *Salar-ool Moolk*, the Private Secretary of the *Nabob*, written according to the statements of *Salar-ool Moolk* and his brother-in-law, *Ghulam Mahomed*, from the dictation of the *Nabob*, and stated to be, in reply to the above petition. This letter was the document referred to in the statement of this first item in the particulars, and commenced as follows:—"My respected Sir,—In conformity with the Order of His Illustrious Highness, I beg to inform your Honour, in reply to your petition, that, out of the sum of 9 *lacs* of rupees which belonged to the mother of your Honour, and which was, at different times, deposited in the presence of His Highness, in charge of the respected

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mother of His Highness, a sum of 7 *lacs* of Rupees was, on one occasion, applied to her use by the respected mother of His Highness, and a bond was thereupon given for it by His Highness, with his signature, under date the 10th day of the month of *January*, of the year of Christ, 1846." The Claimant also produced a promissory note, dated the 10th of *January*, 1846, signed by the *Nabob* in favour of *John Arathoon*, for 7 *lacs* of Rupees, which, from indorsements thereon, appeared to have been satisfied by payments from the *Istafa Cutcherry*, the first payment being of 6 *lacs* of Rupees on 1st of *September*, 1851, and the other payment of 1 *lac* of Rupees, on 28th *August*, 1852. This promissory note was alleged by the Claimant to have been given by the *Nabob* on account of the amount alleged to be shown to have been borrowed by the *Nabob* out of moneys deposited with his mother by the Claimant's mother. The Claimant was examined with reference to his knowledge of the pecuniary transactions between the *Nabob* and his mother, but all his knowledge was derived solely from certain alleged conversations with those parties; and his evidence as to the subject and effect of any conversation could not be relied on, as he confessed to an exceedingly defective memory.

The principal evidence as to the second item of the first part, namely, Rs. 1,00,000, was as follows:— A document, purporting to be a statement of the amount of loan received by the *Nabob's* mother from the Claimant's mother to be repaid by instalments of Rs. 2,000; such amount, being 1 *lac* of Rupees. There was, however, no evidence as to when, or by whom, the above document was written. A letter

from the *Nabob* to his *Dewan*, in which the following passage occurred:—"I then caused the payment to be made, by the adding to the fund the sum of two thousand rupees, on account of the instalment of *Moomtasool Moolk*, which my deceased mother used to pay, in discharge of the balances, amounting to fifty-eight thousand rupees."

The Claimant claimed this second item as against the estate of the *Nabob*, upon the ground, that he took possession of his mother's property upon her death, but no evidence was adduced as to the amount of such property.

No evidence was given by the Claimant in support of the statement in the particulars as to this second item, namely, that the late *Nabob* had promised to repay the sum to the Claimant, with interest at six per cent., by monthly instalments of Rs. 2,000. Nor was any evidence adduced to show any liability on the part of the late *Nabob*, or his estate, in respect of the sum comprised in the second item; on the contrary, the Claimant himself stated that he did not include this second item in the account sent in to the *Istafa Cutcherry*, because it was not the debt of the *Nabob*, but was the debt of the *Nabob's* mother.

The principal evidence as to the third item of the first part of the claim, namely, Rs. 2,00,000, was as follows:—A document purporting to be an account of money deposited by the *Nabob's* grandmother with the *Nabob's* mother, for the use of the Claimant, on the 4th of *September*, 1841, to the amount of 2 lacs of Rupees; and also purporting to contain an account of the amount borrowed by the *Nabob* out of that sum, from time to time, between the years 1844 and 1847, showing the whole sum to have been so borrowed prior

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to August, 1847. The before-mentioned letter from *Salar-ool Moolk* which contained the following passage:—"Besides this, a sum of 2 *lacs* of Rupees which was, one year previous to the coronation of His Highness, deposited with great secrecy with the respected mother of His Highness, by the respected grandmother of His Highness, namely the *Nabob Begum Sahib*, who had brought you up, and who had deposited it for your use like your mother, was also at the same time applied by His Highness to his own use. Documents and instalments will be caused to be issued to your Honour for the same. The omission of this item in the account sent by your Honour to the *Istafa Cutcherry* was, it is believed, owing to the ignorance of your Honour respecting this matter. You having written your petition to His Highness, that His Highness has altogether forgotten your transactions; but since a transaction of which you were not aware has been made known to you, it is manifest that His Highness has not forgotten your transactions."

According to the evidence of the Claimant himself, he never knew anything about the alleged deposit of this sum of 2 *lacs* of Rupees until the receipt of the last-mentioned letter in 1855, although he admitted he was in constant communication with the *Nabob's* grandmother.

In the particulars as to the first item of the second part, viz., Rs. 43,462, the Claimant stated, that he furnished an account containing this item to the *Istafa Cutcherry* in 1847. In the account to which, according to his evidence, the Claimant thus referred, there was no such item as Rs 43,462, but the Claimant stated that such sum was made up of a portion of an

item of the other items comprised in that account, the portion of an item being the sum of Rs. 25,000 and odd, part of a sum of Rs. 55,000, described in such account as "paid to His Highness on different occasions," but part of which, viz., the sum of Rs. 29,000 and odd, was stated not to have been paid by the Claimant, but by a person, called *Rajah Coondun Lall*, and the other items in that account, alleged as making with the sum of Rs. 25,000 and odd, the sum of Rs. 43,462, being as follows:—"On account of *Catarya Nund Loll* and others, Rs. 8,150; for the expenses of the feast called *Eed-ool Fitus*, Rs. 1,000; purchasing a horse from *Arathoon*, Rs. 400; purchasing two horses, Rs. 1,000; two watches, with chains, &c., Rs. 840; composed of various kinds, for discharging the money of the Bond belonging to the *Meer-i-Somany*, or the Commissariat department of the *Durbar*, Rs. 1,050; the account of *Miller*, for the purchase of utensils, &c., Rs. 4,666. 8a.; for the purpose of sending the servants of His Highness to *Ennore* at night, Rs. 400."

With respect to the sum of Rs. 25,000 and odd, being, after deducting the other items from the sum of Rs. 43,462, the sum of Rs. 25,955. 8a., no evidence was adduced, except certain statements of the Claimant, alleging that the sum was due to him. The Claimant was not able to state when or for what sum, or whether any part thereof, was paid by him, and he did not produce any accounts, in fact he admitted that he never kept any regular accounts at all. With respect to the sum of Rs. 8,150, the Claimant confined his claim to the sum of Rs. 5,000, part thereof, and such sum was awarded to him by the judgment of the Supreme Court. With respect

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to the next sum of Rs. 1,000, there was no evidence whatsoever, except the fact of such sum being included in the account, and the statement of the Claimant that he had paid such sum for the *Nabob*, but the Claimant was unable to produce any corroborative evidence, or even to state in what year such alleged payment had been made. With respect to the next sum of Rs. 400, for the purchase of a horse from Mr. *Arathoon*, the Claimant was unable to depose as to the amount he paid *Arathoon*. Mr. *Arathoon*, in giving evidence, said that he had no recollection of the Claimant purchasing a horse for Rs. 400; but, upon the production of his account-book for the year 1846, it appeared that he had in that year sold a horse of the Claimant for Rs. 350. The sum of Rs. 350 was awarded to the Claimant by the judgment of the Supreme Court. With respect to the next sum of Rs. 1,000, for the purchase of two horses, the only evidence given was that of the Claimant and of *Arathoon*. The Claimant did not recollect whether he bought the horses from Major *Taylor*, or *Arathoon*, nor clearly as to the price given by him; and *Arathoon* knew nothing whatsoever about the price, though he recollected the purchase of two horses from Major *Taylor*. With respect to the next two sums, of Rs. 840 and Rs. 1,050, the Supreme Court deemed the evidence sufficient, and awarded the same to the Claimant. With respect to the next sum, of Rs. 4,666. 8a., in addition to the statement of the Claimant that he had paid that sum, Mr. *Miller* was examined, and he proved the payment by the Claimant of Rs. 4,000, on account of the *Nabob*, on the 10th of May, 1847. The sum of Rs. 4,000, was awarded to the Claimant by the judgment of the

Supreme Court. With respect to the next sum of Rs. 400 there was no evidence whatsoever, except the fact of its being an item in the account.

With respect to the second item of the second part, viz., Rs. 70,475. 4a. 6p., the present appeal had no reference, as the Supreme Court, deeming the evidence in support thereof sufficient, awarded the same to the Claimant.

The evidence adduced on behalf of the Government in opposition to the claim, comprised the following documents, namely, a letter from *Gholam Mahomed*, the *Moonshee* of the *Istafa Cutcherry*, to the Claimant, which showed that the Claimant was called upon to furnish a full and detailed account of the debts contracted by the *Nabob* through or with the Claimant, in lieu of the account which had then been sent in, and was described in such letter as "an abstract account." A letter from the *Nabob* to the managers of the *Istafa Cutcherry*, which was as follows:—"Gentlemen,—In answer to your letter, bearing this day's date, it is written, that certainly the matter of *Moemtaz-ool-Bahadoor*, in consequence of there being no satisfactory documents, showing the receipts and balances, &c., as to afford entire satisfaction to you, the members have no right to obtain a speedy and complete settlement. Nevertheless, it appears to me just and proper, that for the present the settlement of the money that stands payable by my deceased *Auliya* (or Highness, meaning thereby the *Nabob's* mother)—that is to say, six *lacs* of Rupees, which is a part of the money mentioned in the bond for seven *lacs* of Rupees now remaining with the said *Bahadoor*—should, one way or other, be made in the first instance, in order that she may not be subjected to any demand or

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caption in the day of resurrection, which in my opinion, and according to my principles, is worst of all things. After this, respecting other matters of the said *Bahadoor*, anything that is to be done in accordance with the rules of those gentlemen will be done. What more should I trouble you with?—*Mohummud Ghous*."

It appeared that shortly after the above letter, and in consequence thereof, the sum of six *lacs* of Rupees was paid by the *Istafa Cutcherry* to the creditors of the Claimant, and an indorsement of such payment made on the promissory note as hereinbefore mentioned. The terms of the above letter were directly opposed to the allegations of the Claimant as to the promissory note having been given by the *Nabob* in respect of moneys borrowed by him out of the nine *lacs* of Rupees, alleged to have been deposited by the Claimant's mother with the *Nabob's* mother. A letter from *Gholam Mahomed* to the Claimant, reproaching him for his negligence, and requesting him immediately to send in his accounts and notes of hand: and another letter from *Gholam Mahomed* to the Claimant, stating that no answer had been received to his previous letter of the 4th of *September*, and pressing for the accounts, in order that they might be submitted to the *Nabob*, were also produced.

The claim was heard before Sir *Adam Bittleston*, the Officiating Chief Justice, in the months of *June*, *September*, and *October*, 1860; and on the 14th of *December*, 1860, that Judge pronounced judgment and passed an Order thereon. By such Order and judgment the Supreme Court disallowed the whole of the items comprised in the first part of

the Claimant's particulars, with costs; and with respect to the second part of such particulars, the Court awarded to the Claimant the several sums of Rs. 70,475. 4s. 6p., Rs. 5,000, Rs. 350, Rs. 840, Rs. 1,050, and Rs. 4,000, and interest and costs of and incident thereto, and disallowed the residue of the claim to the items in such second part, with costs.

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The Claimant being dissatisfied with the Order and judgment of the Supreme Court, obtained leave to appeal to Her Majesty in Council against so much thereof as did not allow to him the moneys and interest claimed in his particulars, over and above the sums and interest mentioned as allowed in the Order and judgment (save only as to the sum of Rs. 3,150, paid by the *Istafa Cutcherry*, as admitted by the Claimant, and his costs thereof), and also against so much of the Order and judgment as directed the payment by him of such costs, as in that Order mentioned.

Before any proceedings were taken in the appeal, *Ghoolam Moortoozah Khan Bahadoor*, died, having by his Will appointed *George Gilbert Keble Richardson* and *James Scott Savery Richardson*, two of his executors thereof, who, on the 24th of April, 1862, proved the same in the Supreme Court at *Madras*. By an Order in Council, dated the 3rd of February, 1863, the appeal was revived, and leave was given to them, as executors, to prosecute the appeal, which was accordingly done.

In support of the appeal, the Appellants by their case contended, that the judgment of the Supreme Court at *Madras* was erroneous.

First, as the Government were bound by the

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admission of the late *Nabob*, that he was indebted to the Claimant for the amounts claimed for money advanced to and paid on account of the *Nabob*.

Second, that there was sufficient evidence to show that the sums in question were advanced and paid on account of the Claimant; and

Third, that the Supreme Court ought not in equity to have ordered the Claimant to pay the Respondents the costs of appearing and opposing his claim at the hearing.

The Government submitted, that the Order and judgment was right—

First, as respected the first and third items of the first part, that there was no trustworthy evidence of the Claimant's mother having made the alleged deposits with the *Nabob's* mother, and that the means and the conduct of the Claimant's mother, so far as the same appeared in evidence, were opposed to the supposition of such deposit having been made.

Second, that with regard to the second item of the first part, there is no trustworthy evidence of the *Nabob's* grandmother having made the alleged deposit with the *Nabob's* mother, and that the conduct of the *Nabob's* grandmother was opposed to the supposition of such deposit having been made.

Third with regard to the items of the first part, that even if the alleged deposits by the Claimant's mother and the *Nabob's* grandmother with the *Nabob's* mother were in fact made, it was not proved that the *Nabob* borrowed, or appropriated to his own use, the sums so deposited, or any of them.

Fourth, as respected all the items of the first part, even if the moneys were, in fact, deposited, and the

*Nabob* did actually borrow or appropriate the same his own use, the claim of the former Appellant in respect thereof, was not such a claim as could be allowed, consistently with the provisions of Act, No. XXX. of 1858, under which the claim was preferred.

Fifth, as respected the sums and portions of sums comprised in the first item of the second part, which were disallowed by the judgment appealed from, that there was not sufficient evidence to prove that such sums, or portions of sums, were justly and fairly due to the former Appellant from the *Nabob* at the time of his death; and

Lastly, that the parts of the Order appealed against were in accordance with the probabilities of the case, and no other Order with respect to the subject-matter of the appeal would have been warranted by the evidence adduced in the case.

Sir *Hugh Cairns*, Q. C., and Mr. *Ayrton*, were heard for the Appellants.

At the conclusion of their argument, their Lordships, without-calling upon

The Solicitor-General (Sir *R. Palmer*), Mr. *Forsyth* Q. C., and Mr. *W. H. Melvill*, who appeared for the Government,

directed the case to stand over.

After consideration, judgment was now delivered by

The Right Hon. Lord KINGSDOWN.

This case stood over after the Appellant's Counsel had been heard, in order that their Lordships might have an opportunity of examining the evidence on which the questions raised by the appeal depend.

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They have accordingly done so, and having considered it carefully, and fully weighed the arguments advanced on the part of the original Appellant, in the course of which everything that can be found in the record favourable to his case, was well connected and arranged, they have come to the conclusion that the appeal cannot be supported.

It is brought against an Order of the Supreme Court of *Madras*, disallowing some, while it allowed other items of a claim preferred by *Ghoolam Moortoozah Khan Bahadur*, the deceased Appellant, under the Act passed in 1858, by the then Legislative Council of *India*, for the administration of the estate and for the payment of the debts of the last *Nabob* of the *Carnatic*.

The claim was made under the 14th section of the Act, No. XXX. of 1858. By that and the subsequent sections it is provided, that any person claiming to be a creditor of the late *Nabob*, who shall file a declaration stating that he is willing to receive in full discharge of all his claims against the *Nabob*, or his estate, such amount as the Supreme Court shall award under the provisions of that Act, shall be entitled to have his claim investigated in a summary way, and to receive the amount awarded out of the assets of the late *Nabob*, in the hands of the Receiver appointed under the Act, if these shall be sufficient for the purpose; and if they shall be insufficient, out of the Public Treasury. The Court, however, in the exercise of this summary jurisdiction, is by the 22nd section forbidden to allow to any Claimant, in respect to money lent or advanced, any larger sum than the amount which shall be proved to have been actually advanced to or for the late *Nabob*, with simple interest

thereon, not exceeding the rate of six per centum per annum'; or to any Claimant in respect of goods supplied, or of any other matters, any larger sum than the amount shall be proved to have been the fair and actual value thereof at the time when the debt was incurred, with simple interest, not exceeding the rate aforesaid, if the Court shall consider the Claimant entitled to interest. It would seem, therefore, that the Act not only limits the extraordinary remedy which it gives to certain defined classes of debt, but throws upon the Claimant more than the ordinary burden of proof, compelling the holder of any written acknowledgment, or security, to prove the actual consideration for it; and those claiming the price of goods delivered, to prove the fair and actual value of them.

The late Appellant, who was a kinsman of the *Nabob*, and was always on terms of intimacy with him, appears to have been an extravagant, and, for many years, a needy person. In 1843, he took the step, most unusual, as we understand, for a person of his rank, of passing through the Insolvent Court. In 1851, on the occasion of making a final settlement with his creditors, he was assisted by the issue, by the *Nabob*, of sum securities, known as the *Istafa Cutcherry Bonds*, to the extent of seven *lacs* of Rupees. These Bonds were handed over to creditors of the late Appellant; they have been since paid, and are not now in question. It is said on the part of the Appellant that they were given in part discharge of a large debt due from the *Nabob*, but that this payment left other demands still unsatisfied, which are the subject of the present proceedings.

The principal item now in controversy, is founded

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upon moneys said to have been placed by the mother of the late Appellant in the hands of the mother of the *Nabob*; three *lacs* by way of loan, two *lacs* by way of deposit in trust for the late Appellant.

For these sums it is not pretended that the *Nabob* was originally liable, but it is stated, that he received them from his mother, and thereby became liable for them, and acknowledged his liability. The debt of seven *lacs* of Rupees was said also to have consisted mainly of moneys advanced in the same way by the mother of the *Nabob*, and secured by his promissory note.

The story told on behalf of the late Appellant seems to their Lordships full of the grossest improbabilities. It is highly improbable that his mother, who appears to have been in the receipt of a small pension only, should have had the means of advancing, as she is said to have done, no less than ten *lacs* of Rupees to the mother of the *Nabob*, especially within the short period within which these sums are alleged to have been advanced. It is equally improbable that these advances, is in fact made by the late Appellant's mother should have been made, as they are alleged to have been, without his knowledge. If these sums were really due, it is scarcely to be credited that the claim for them should not have been prosecuted in 1848, when the account was sent in to the *Istafa Cutcherry*,—an account, it is to be observed, in which written documents not now produced are referred to as vouchers for some of the items. Again, it is most improbable that the grandmother of the *Nabob* should have deposited two *lacs* of Rupees with the *Nabob's* mother as a provision for the late Appellant, and that no communication should for several years have been

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made to him upon the subject. Yet there is no trustworthy evidence to explain any of these improbabilities, or to support the ingenious theories suggested at the Bar. The promissory note for seven *lacs* of Rupees, part of these alleged advances, is not given to the *lādī* who is said to have made the advances, but no *Arathoon*, who appears to have been engaged in other pecuniary transactions with the *Nabob*. No reliance can, in their Lordships' judgment, be placed on the letters alleged to have been written by or by the direction of the *Nabob* admitting the late Appellant's claims, or upon the extracts alleged to have been made from the *Nabob's* accounts. The letter of the 26th of *April*, 1848, in their Lordships' opinion, bears upon the face of it palpable marks of having been concocted for the mere purpose of sustaining the late Appellant's claims, and cannot be relied upon to support them; and if this document be fabricated, the fabrication is all but fatal to the Appellant's case. Beyond this, it is plain upon the evidence, that the *Istafa Cutcherry* disputed the late Appellant's claims. He was called upon for accounts and particulars. He rendered none, and did not prosecute his claim in the lifetime of the *Nabob*. Moreover, the evidence shows that the late Appellant for some time at least acted as agent for the *Nabob*, and was in receipt of moneys on his account, and there is no proof of these moneys having been fully accounted for by him. Their Lordships are satisfied that the Court below was quite right in holding that no sufficient evidence had been offered in support of this charge.

Nor have they been able to satisfy themselves that any of the smaller items which have been disallowed

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on the second part of the claim ought to have been allowed. It is unnecessary to consider whether some of the items disallowed, if satisfactorily proved, would have constituted debts recoverable under the 14th section of the Act, because their Lordships think that they are not proved. It is not the course of this Committee to disturb the finding of the Courts below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage, either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination, and of inspecting the original documents. Their Lordships also feel that in the exercise of this Statutory and peculiar jurisdiction, the Court below was almost bound to insist on the utmost strictness of proof. For it needs but little knowledge of human nature, as it exists in *India*, to see that a scheme involving the payment out of the public Treasury of the debts of a native Prince, who seems to have lived and died in a state of chronic insolvency, was calculated to bring forth a host of Claimants not likely to be very scrupulous, either in the statement of their demands, or in the manufacture of evidence to support them. And, it is obvious that the Government which has thus undertaken to pay the debts of the *Nabob*, must be without many of the means which an ordinary representative of a deceased person would have of resisting claims, either wholly false or dishonestly swollen.

Upon the whole case their Lordships are unable to see any sufficient ground for disturbing the judgment

of the Court below, and they must, therefore, humbly recommend to Her Majesty that this appeal be dismissed, with costs.

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 LYPERSHAD (Ghatwal), the son and  
 heir of BIKRUM SINGH, deceased,  
 and GOOMAN SINGH ... } *Respondents.\**

*An appeal from the Sudder Dewanny Adawlut at Calcutta.*

IN this case the appeal was brought from such part of a decree of the *Sudder Dewanny Adawlut*, dated the 29th of *February*, 1860, as did not award to the Appellant, the *wasilat*, or mesne profits, of certain *Ghatwally* lands released from assessment by such decree. The decree in question, was made in a suit instituted by the

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The *Sudder Dewanny, Adawlut* at *Calcutta*, acting as Special Commissioners, under *Ben. Reg. III. of 1828*, in resumptionsuits have jurisdiction in a summary way to direct payment of *wasilat*, or

\* Present: Members of the *Judicial Committee*.—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir John Taylor Coleridge.

*Assessors*.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

mesne profits, of lands taken possession of by Government for resumption, to the party entitled to the same, upon a decree declaring the lands not liable to assessment.

If the Court is not satisfied with the title of the party claiming the *wasilat*, the proper course to pursue is to direct inquiries to find the party entitled.

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*Bengal* Government to resume and assess certain *Ghatwally* lands. The lands consisted of thirteen *mouzahs*, situate in the *Pergunnah*, *Wusluh* and *Mahalat Khurruckpore*, in the *Zemindary* of *Khurruckpore*, to which the Appellant, as heir of his father, the late *Rajah Bidanund Sing*, succeeded as *Zemindar*; and were held of that *Zemindary* by the *Ghatwals*, for the protection of the *Zemindar's* other lands, by guarding the *ghats*, or passes, in the neighbouring mountains from the invasions of Hill men and robbers. A decree, in the first instance, was made in the suit in favour of Government by the Special Deputy Collector, which decree was reversed on appeal by the *Zillah* Judge, exercising the powers of a Special Commissioner of Government under *Ben. Reg. III.* of 1828. The decision of the *Zillah* Judge was, in its turn, reversed, and the decision of the Deputy Collector substantially restored by the Officiating Judge of the *Sudder Dewanny Adawlut*, exercising the powers of a Special Commissioner under that Regulation. Subsequently, a decree was made by Heir Majesty in Council in an analogous case (*a*) wholly inconsistent with the decree in the present case, and in consequence thereof the *Sudder Dewanny Adawlut* by three of its Judges, also exercising the powers of Special Commissioners, upon a petition for review, pronounced a final decree, a part of which was now appealed from, and by such decree it was declared, that the resumption and assessment of the lands in question was illegal and the relinquishment thereof by Government ordered. The Court, how-

(*a*) *Raja Lelanund Sing Bahadoor v. The Government of Bengal*, 6 Moore's Ind. App. Cases, 101, where the nature and tenure of *Ghatwally* is fully described.

ever, refused to decide on the right of the Appellant, as *Zemindar*, to have from the Government the *wasilal*, or mesne profits, of the lands in question, being a portion of his *Zemindary*, after the resumption and during the long period they were in the possession of the Government, or of the other parties with whom the Government made a temporary settlement thereof.

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By the Order made in the appeal of *Raja Lelanund Sing Bahadoor v. The Government of Bengal*(a), known as suit, No. 2,045, their Lordships reversed the decree in that suit made by the Special Commissioner, and declared that the *Ghatwally* lands in that suit were not within the meaning of cl. 4, sec. 8, Reg. I. of 1793, as included in allowances made to the *Zemindar* for Police establishments; but that they formed a part of the *Zemindary* of *Khur-ruckpore*, and were included in the Permanent Settlement for that *Zemindary*, and covered by the *jumma* assessed upon it.

In consequence of that decision the Appellant, on the 9th of *July*, 1856, presented a petition in another resumption suit, which, with many others relating to the same subject and in the same *Zemindary*, had been instituted by the Government, to the Special Commissioner of *Calcutta*, stating the judgment of the Lords of the Judicial Committee in the above appeal, submitting that the two cases were similar, and that the decree ought to be the same in both, and praying that an order might be made admitting a review of the judgment and decree of the Special Commissioner made on the 14th of *August*, 1851, in the present suit. This petition, although it

(a) 6 Moore's Ind. App. Cases, 132.



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had special reference to the present appeal, applied also to eighty-two other cases in which the Government had sued to resume *Ghatwally* lands within that *Zemindary*, and had obtained decrees in its favour. The *Ghatwals* were not represented by *Vakeels* before the Commissioners.

The hearing of the petition for review took place on the 29th of *February*, 1860, before Messrs. *H. T. Raikes*, *C. Binny Trevor*, and *E. Alexander Samuels*, three of the Judges of the *Sudder Dewanny Adawlut*, acting as Special Commissioners, when they pronounced judgment, granting a review of the judgment complained of, as well as that passed by the Court, sitting as Special Commissioners, in the eighty-three, and two other cases specified, but they declined to decide the question of the Appellant's right to the *wasilat*, or mesne profits, as being beyond their jurisdiction, the *Ghatwals* not being represented by *Vakeels*, and refused to make any Order in respect of a sum of money paid by the *Zemindar* to the Government. The material part of this decision will be found in the judgment of their Lordships on this appeal (a).

The Appellant presented a petition for leave to appeal to Her Majesty in Council, from so much of his decree as was adverse to the claim of the Appellant, to the *wasilat*, and possession of the *mouzahs* in question.

On the 7th of *February*, 1861, an Order was made by the *Sudder Dewanny Adawlut*, upon the petition of the Appellant, directing that the names of *Kallypershad*, *Ghatwal* (son of *Bikrum Sing*), and *Gooman Singh*, a purchaser, should be inserted as Respondents, with the *Bengal Government*; such insertion

was accordingly made, and subsequently the appeal was admitted.

The Government of *Bengal* alone appeared before the Privy Council to support the decision of the Special Commissioners.

Mr. *Rolt*, Q. C. and Mr. *Leith*, for the Appellant argued.

First, that the *mouzahs* in respect of which the *wasilat* accrued, were a portion of the *Zemindary* of the Appellant, for which the revenue had been and still was under the Permanent Settlement paid to Government by him, or those through whom he claimed title as *Zemindar*, and consequently any mesne profits received by the Government in respect of the *mouzahs* ought to have been paid over to him the Appellant as *Zemindar*.

Second, that as to that portion of the *wasilat* which was paid out of the Government Treasury to the Appellant under a former decree in his favour, the same having been subsequently deposited by him with the Government under protest to abide the result of the litigation as to the resumption of the lands themselves by Government, the same ought to have been refunded to the Appellant, as a matter of course, on the final decision in his favour.

Third, that even as between the *Zemindar* and the *Ghatwals*, the Court below had jurisdiction to determine any question of right as to the mesne profits, regard being had to the powers formerly exercised by the ordinary Courts of Judicature in like cases under cl. 1, sec. 31, *Ben. Reg.* II. of 1819, to grant redress in any case in which the Revenue authorities should violate the rights secured to a *Zemindar* by the Per-

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manent Settlement, and with reference to the powers of Special Commissioners, appointed under Ben. Reg. III. of 1828, section 2, for the final determination of like cases, in place of the ordinary Courts, whose powers are by such Regulation expressly taken away, and the decree of such Special Commissioners made final; and further that if there was any defect of parties, by reason of the *Ghatwal* not appearing by *Vakeel*, on the hearing on the petition for review the Court might have ordered such defect to be remedied, and, if necessary, might have postponed the hearing for that purpose, so that complete justice might have been done in that suit.

The Attorney General (Sir *R. Palmer*), Mr. *Forsyth*, Q. C., and Mr. *W. H. Melvill*, for the *Bengal* Government.

Contended, first, that the right to demand payment of the *wasilat* and interest thereon from the Government Treasury was in the *Ghatwal*, if in any one, as the *Ghatwal* was in possession of the lands in question at the time of the institution of the resumption proceedings, and he had paid into the Government Treasury the principal sum claimed by the Appellant, the *Zemindar*, and that there was nothing to show that, independently of those proceedings, such possession could have been interfered with, and

Secondly. That no claim was made to the *wasilat* before the Special Commissioners on the part of any person other than the Appellant, and, therefore, the Court below could not properly have adjudicated upon the claim to the *wasilat* between the *Ghatwal* and the *Zemindar*.

• Their Lordships' judgment was delivered by

The Right Hon. the Lord Justice KNIGHT BRUCE.

The appeal in this case is by the *Zemindar* of *Khurruckpore*, from a portion of a decree pronounced in the year 1860, by three Judges of the *Sudder Dewanny Adawlut* at *Calcutta*, acting as Special Commissioners under Regulation III. of 1828. The Government of *Bengal*, the only party besides that has (whether both or either of the other Respondents, or nominal Respondents, could or could not have) appeared here is content with the decree, has submitted to it, and desires to support it as it stands.

The matter arose thus :—Some years before the year 1855, the Government of *Bengal* claimed a right to resume or reassess lands of considerable extent and value within the *Zemindary* of *Khurruckpore* in the possession of various *Ghatwals*, who held them by *Ghatwally* tenure under the *Zemindar*. The claim was enforced by the Government, though opposed on the part of the *Zemindar*, and for some time at least on the part of some, if not all, of the *Ghatwals*. There was a great and complicated mass of litigation upon the subject before various Tribunals, with various success; sometimes one party gaining a decision, sometimes another. The suits were numerous. At last the *Zemindar* brought one of them by appeal before Her Majesty in Council, and upon that appeal (*Raja Lelanund Singh Bahadoor v. The Government of Bengal*) the Judicial Committee, in 1855, decided against the *Bengal* Government on grounds fatal in principal to its entire claim of resumption and reassessment as to all the *Ghatwally* lands. The decision was in the same year sanctioned by Her Majesty.

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The case, with the judgment delivered here by Lord *Kingsdown* on the part of the Judicial Committee, is reported in Mr. *Moore's* Sixth volume of "Reports of Indian Appeals," p. 101, a report to which their Lordships refer, and which has, during the argument on the present appeal, been cited more than once. This decision the *Bengal* Government, or the Special Commissioners, determined very properly to consider binding as to all the *Ghatwally* lands that had been resumed, or reassessed, and the invalidity of the resumption and reassessment from the beginning may be treated as now established. But there remained a material question—the question as to the right to recover from the *Bengal* Government the large sums which, as rents, or profits, they had wrongfully or erroneously, by means of the invalid resumption, or reassessment obtained from the *Ghatwals*. The Government had latterly not disputed, nor does dispute, its liability to make good this amount with interest to some person or persons, but for some years has, in consequence of the decision of 1855, considered itself as owing the amount with interest to or holding it for some person, or persons. After the judgment of 1855, the *Zemindar* instituted, or continued a proceeding before the Judges of the *Sudder Dewanny Adawlut*, as Special Commissioners, for the purpose of obtaining the benefit of that judgment, and payment of the principal and interest of the sums which in respect of the lands or part of the lands the Government had wrongfully or erroneously received. This proceeding was brought to a hearing in 1860, and upon it the Judges made the decree now under partial appeal as already stated. The material portion of it is as follows:—"The Government Pleader argues

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that it is nowhere contended that these lands when resumed were not in the possession of the *Ghatwals*, who paid, in some instances, a small quit-rent to the *Zemindar*, and in others, nothing at all; but they were bound in either case to render certain public services, as the conditions of holding their tenures. That, as the services of the *Ghatwals* were excused during the resumption of their lands, they might, with some reason, claim a refund of the past collections on the release of the lands, minus the value of the services they would have performed if no resumption had taken place; that the landlord cannot, however, under any circumstances, be entitled to this refund; that, moreover, the *Ghatwals* themselves have raised no claim for refund, and are not represented before the Court; and as the *Zemindar* has paid no thing, he has no right to demand the *wasilat*. It appears to us that, under the circumstances thus disclosed in the statements of the parties before us, the applications for a review of the several judgments passed by this Court, as Special Commissioner, at different times in the eighty-three cases now under consideration, should be granted; and, as the only point for determination is the applicability of the decision passed by the Privy Council on the 13th of August 1855, in cases No. 2,045, to the cases now before us, and that point is conceded by the Government, who has also intimated to us, through the Government Pleader, that out of deference to the decision of the High Court of appeal, the lands have been already restored to the *Ghatwals*, it seems to us unnecessary to postpone judgment in these cases. On the authority, then, of the Privy Council's decree, and for the reasons set forth therein we

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reverse the decision passed in the several 'cases brought up for revision before us, and direct that the resumed lands be released from 'assessment. As to the *wasilat*, which has been taken by the Government from the parties in possession, if the contest before us was confined to the simple question whether the Government was liable or not to the *Zemindar* for the amount, we should have no hesitation in declaring, that as the Government Officers are held to have had no valid ground for the proceedings under which they resumed and assessed the lands dispensing with the services previously rendered by the *Ghatwals*, and not showing that any expenditure was made for the employment of others in their place and vocation, so they cannot be allowed to appropriate these collections for the benefit of the State, on the grounds and assignments set up by the Government Pleader in this case. But the contest is not confined to this question, but involves the rights of the Applicant and others, the *Ghatwals* not now before the Court, whose rights are altogether denied by the *Zemindar* to receive the refund. Now, *primâ facie*, the right to receive the sums collected, with deductions for quit-rent due to the *Zemindar*, is with the *Ghatwals*, and not with the Applicant before us. But, he that as it may, it is not within the competency of this Court, acting as Special Commissioners, under Reg. III. of 1828, sec. 3, summarily to determine a question of disputed private right of this nature, the more especially when one of the parties interested has not appeared before us, and is probably ignorant that such a question would be mooted in these proceedings. Such question must be left to be decided by the regular Civil Courts of the country. It is only

necessary' to add, that as the resumption proceedings have been determined to be contrary to law, we award to the *Zemindar* the entire costs of these proceedings in the resumption Courts, with interest thereon, from the date on which he filed his application for review of their judgment. Copy of this Order to be filed in the other twenty-two cases, to which it equally applies."

The *Zemindar* complains here of the omission to decide as to the right to the fund, which, as has already been mentioned, the Government did not then and does not now claim to retain for its own use, and contends that it ought to have been wholly adjudged to him. The Bengal Government, on the contrary, supports the title or alleged title of the *Ghatwals*, or their representatives, to receive back the money which was unduly, or in an improper manner, taken from them. To this appeal one *Ghatwal* and a purchaser from him have been added, at least nominally, as parties Respondents. Neither of them, however, has appeared here, nor are their Lordships convinced that without the consent of the *Zemindar*, either of them would have been allowed to appear as a Respondent on this appeal.

Part of the fund claimed was, during a period of temporary success on the *Zemindar's* part against the Government, paid to the *Zemindar* under an express liability to pay it back if there should be a subsequent decision against him, as there was, and he paid it back, and with regard to this portion of the fund claimed it has been, in an especial manner, strongly urged for him that it ought clearly to be now restored to him, whatever may be done as to the rest. Their Lordships, however, considering the circumstances in which the amount received by

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him came to his hands and left them again, are of opinion that both portions of the fund ought to be dealt with on one and the same principle. Their Lordships are also of opinion, that the Judges who pronounced the decision now under appeal, though acting as Special Commissioners, had, from the nature of the subject, jurisdiction to direct payment of the whole money in dispute, with interest, to the person or persons entitled; that jurisdiction their admitted power of 'deciding as to the correctness' or incorrectness of the resumption appears to us to have included. The Judges, therefore, who made the decree of 1860, should, in their Lordships' view of the matter, have not been silent as to the title to the money, but have declared and acted on it, if able, from the materials and parties before them to do so, or if not so able, have directed an inquiry to ascertain the person or persons entitled. Now, the *Ghatwals* were not represented, or were imperfectly represented, before the Court, when the decree of 1860, was made, and their Lordships from the materials before them are not satisfied that a portion at least of the fund does not belong to the *Ghatwals* from whom it was received, or their representatives. In using these expressions their Lordships treat the controversy as extending to all the sums received by the Government under the resumption or reassessment, though their conclusion would be substantially the same if it were treated as confined to the fund strictly subject specifically to the particular proceeding in which the Order of 1855, or the decree of 1860 was made. That a portion of the fund belongs to the *Zemindar* their Lordships think highly probable, if on account only of his quit-rent or

quit-rents, fallen into arrear, but possibly also he may have a just claim on more than this portion, or even the whole fund, in respect of services which the *Ghatwals* were, or had been, under an obligation to perform, and have, from any cause whatever, not performed. Subject to that deduction, or those deductions, as the case may be, in favour of the *Zemindar*, there appears to their Lordships a title fit to be considered to the whole fund in the *Ghatwals* who were in the actual enjoyment of the lands, or their representatives. But their Lordships are of opinion, that they have not, and that in 1860, the Judges of the *Sudder Dewanny Adawlut*, (the Special Commissioners) had not before them, sufficient materials to enable them, to direct safely, or without hazard to justice, the payment, apportionment, or distribution of the fund or any part of it, and that accordingly the decree of 1860, should be added to, and that it should be declared that the Special Commissioners, the Judges of the *Sudder Dewanny Adawlut*, had and have jurisdiction to decide upon the true title to the funds in question upon this appeal, and to direct the payment and disposition of those funds, with interest, accordingly, but that, at the hearing on which the decree under appeal was made, it did not sufficiently appear who was or were the person, or persons, justly entitled to the money, and that an inquiry ought to have been directed by the Court on that subject; and that with this declaration the case should be remitted to *India*, in order to be further dealt with by the Special Commissioners on that footing. We conceive that the Government ought to pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

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KHAJAH MOHAMED GOUHUR ALI KHAN, *Appellant,*

AND

ASHRUFOONISSA, KHAJAH WAHED<sup>s</sup>

HOSSEIN KHAN and WAJED HOS-

SEIN KHAN, heirs of KHAJAH

BURKUTOOLLAH KHAN, and KHA- } *Respondents.\**

JAH HOOBEBOOLLAH KHAN, heir-

at-law of the late Khajah Wahed

Ali Khan, deceased ... ..

*On appeal from the Sudder Dewanny Adawlut at Calcutta.*

15th & 16th  
July,  
1863.

THIS appeal was brought from a decree of the *Sudder Dewanny Adawlut at Calcutta*, by which that Court decreed to the Respondents ten shares of the real estate of *Ibrahim Khan*, otherwise called *Newab Jan*.

*Khajah Burkutoollah Khan and Khajah Wahed Ali*

\* Present : Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

*Assessors*,—The Right Hon. Sir Lawrence Peel.

In an action of ejectment to recover real estate, the Plaintiffs claimed as heirs. The issue directed by the Court was, whether the party in possession, under a decree made in a summary

suit, pursuant to the Act, No. XIX. of 1841, was legitimate. In such circumstances held, that as the title of the Plaintiffs depended upon the illegitimacy of the Defendant, they were bound to prove by sufficient general evidence, their heirship, in order to throw upon the Defendant the *onus* of proving his legitimacy.

The evidence upon that issue being unsatisfactory, the case was remitted to *India* for further proof.

It is the duty of a Judge in *India* trying a suit to state in his judgment, the grounds upon which he has arrived at the conclusion he has formed upon the evidence; and not simply to state, in a general manner, that a party was entitled, as such a course does not afford the appellate Court the assistance it is bound to expect from the Court below.

*Khan* were the uterine brothers of one *Khajah Aboo Mahomed Khan*, who was the father of *Ibrahim Khan*, and who, besides *Ibrahim*, had another son, called *Wuseer Jan*, otherwise called *Abdool Kadir Khan*, who, with *Burkutoollah Khan*, and *Wajed Ali Khan*, were the heirs of *Ibrahim Khan*, and entitled to the shares of his estate which was decreed to the Respondents, if it was established that *Wuseer Jan* died without leaving legitimate issue. The Appellant alleged that he was the lawful son of *Wuseer Jan* by *Mussumat Alarukhee*. The Respondents denied that such was the case, and the only question in the appeal was, whether the Appellant had made out his alleged heirship by satisfactory evidence.

The circumstances of the case were these :—

*Burkutoollah Khan* and *Wajed Ali Khan* and *Aboo Mahomed Khan*, were the sons, by different mothers, of *Bhahadour Beg Khan*, a Mahomedan of wealth and high position ; and on his death, his property was divided between the three sons as his heirs. *Aboo Mahomed Khan* had two sons—*Ibrahim Khan* and *Wuseer Jan*. *Ibrahim Khan* were married, during his father's lifetime, to *Khudijah Begum*. *Wuseer Jan*, the other son, as it was alleged by the Respondents, was of weak intellect from his birth, a cripple and impotent, and never married.

In the year 1840, *Aboo Mahomed Khan* died, leaving surviving his widow, *Fatimatoonnissa*, *Ibrahim Khan*, and a daughter named *Soorut Begum*, who become entitled to his property in certain proportions, and who, on the 6th *Maugh*, 1350 (1843), executed a *Tukseemnama*, or deed of partition, by which *Ibrahim Khan* took nine *anna*, the widow two, and *Soorut Begum* four *anna* shares ; and they enjoyed the property

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accordingly until the death of *Soorut Begum*, who died childless, in 1848, when a fresh partition was made between *Ibrahim Khan* and *Fatimatoonnissa*, who held possession until *Ibrahim Khan's* death, in May, 1850, and, upon his death, the right to the property devolved in equal thirds upon his mother, *Fatimatoonnissa*, and his uncles *Burkutoollah Khan* and *Wajed Ali Khan*.

Shortly after *Ibrahim Khan's* death, the Appellant, who was then an infant, was set up as the child of *Wuseer Jun*.

It appeared that *Ibrahim Khan*, who had been married to *Khudijah Begum*, was, on the 28th of July, 1845, divorced from her, and, as was alleged, never cohabited with her afterwards. Notwithstanding, however, that the effect of the divorce was to deprive *Khudijah Begum*, of all right to any share in the succession of *Ibrahim Khan*, she, upon his death, claimed her share as if she had remained his wife, and accordingly she filed a petition under the Act, No. XIX. of 1841, claiming a four *anna* share. *Burkutoollah Khan* and *Wajed Ali Khan* also filed petitions in a similar suit under that Act, claiming their two-thirds as the uncles of *Ibrahim Khan*.

On the summary suit under Act, No. XIX. of 1841, being brought to a hearing, on the 30th of September, 1850, when the Appellant was put in possession, and *Burkutoollah Khan* and *Wajed Ali Khan* were put by the Court to a regular suit, and after an ineffectual appeal to the *Sudder*, a plaint was filed by them in the *Zillah Court* of *Patna*, on the 14th of February, 1852, against *Alarukhee* for herself, and as guardian of the Appellant, a minor, *Khudijah Begum* and *Meer Ismael*, executor and *Mutowallee* of the late *Fatimatoonnissa Begum*, as Defendants.

The suit was brought to obtain possession from the Appellant of two-thirds out of three-thirds of the property left by *Ibrahim Khan*, deceased, and to reverse the Order of the Judge of the City of *Patna*, of the 30th of *September*, 1850, and the Order made on appeal therefrom of the *Sudder Dewanny Adawlut*, affirming the same. The plaint stated, amongst other things, that the Plaintiffs claimed title as uncles and heirs of the deceased, and alleged, that *Wuseer Jan* was by nature insane and impotent, and so continued up to his death, notwithstanding his father's endeavours, by the aid of doctors, to restore his powers of manhood; that he died without having ever been married, and without leaving any issue; and it was then further stated and the plaint charged, that *Ibrahim Khan* died, leaving the Plaintiffs, his uncles, and the late *Fatimatoonnissa*, his mother, his only heirs him surviving; his wife, *Kudijah Begum*, having been legally divorced in his lifetime. The plaint then stated the proceedings had under Act, No. XIX of 1841, including the above-mentioned two Orders of the *Zillah* and *Sudder Courts*.

The answer of *Alarukhee Begum* set up the Appellant's title as her son by *Wuseer Jan*, as displacing the alleged title of the Respondents; and insisted that *Wuseer Jan*, her husband, was neither insane, nor impotent; alleging that *Wuseer Jan* married her according to the forms of the Mahomedan law; that the marriage was consummated; and that the Appellant was his son by that marriage; she further alleged, that the Appellant was married to the daughter of a highly respectable person named *Meer Syud Ali*, brother of the late *Fatimatoonnissa*;

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and that the latter and *Meer Ismael* had admitted the Appellant's heritable rights in the former proceedings under Act, No. XIX. of 1841.

*Khudijah Begum's* answer simply raised the question, whether there had been cohabitation between her and *Ibrahim Khan* after the divorce.

Of the issues directed by the Court, the only material one was the fourth, namely: Was the Appellant the son of *Wuzeer Jan*?

The evidence upon this point was contradictory. The Appellant, in support of his claim, filed documentary evidence and examined witnesses. The documentary evidence consisted of proceedings subsequent to *Ibrahim Khan's* death, and to which *Burkutoollah Khan* and *Wajed Ali Khan* were not parties, in which the Appellant was treated as the nephew and heir of *Ibrahim Khan*. A *vakalutnamah* by *Syud Ali*, brother of *Meer Ismael*, dated the 10th of March, 1851, in which the Appellant was also so described. *Pottahs*, mortgages, and *Kabooleats*, executed by or to *Alarukhee Begum* in the years 1851 and 1852, as guardian of the Appellant, in which he was also treated as heir; also a declaration of the recognition of the Appellant as *Wuzeer Jan's* son by *Fatimatoonnissa*, and a conditional sale to the Appellant's wife. Four witnesses were examined to prove the fact, that he was the legitimate son of *Wuzeer Jan* by *Alarukhee Begum*, his wife, and of his having been as such recognized as the heir of *Ibrahim Khan* on his decease. On the other hand, *Burkutoollah Khan* and *Wajed Ali Khan* called several witnesses, who deposed to the alleged incapacity of *Wuzeer Jan*, and that the Appellant was *Alarukhee Begum's* son by one *Lal Darogah*.

The hearing of the suit took place on the 31st of May, 1854, before Mr. *William Travers*, the Judge of the Civil Court of the City of *Patna*; when that Judge delivered judgment, the material part of which was in these terms:—"For trial of the fourth issue, there were adduced in evidence three papers filed before the Judge of *Patna* on occasion of his deciding the case under Act, No. XIX. of 1841, on account of which this action is laid. Two of these are copies of petitions presented by the Defendant, *Meer Ismael*, and the third is a petition from *Khudijah Begum*. All three are stated to afford proof of *Alarukhee Begum* being a concubine and not a married woman; but, in my opinion, no such inference is to be deduced from them. Both *Meer Ismael* and *Khudijah Begum* were at the time earnestly engaged in the endeavour to establish a title of their own; and, in doing this, certain unguarded expressions seem to have escaped them, to the effect, whether *Alarukhee Begum* was a married woman, or not, and her reputed son, *Gouhur Ali*, legitimate, or otherwise, still that neither contingency could affect the claim of the Defendants. Loose expressions of this kind convey nothing more than a spiteful imputation, and when cited as evidence are simply ridiculous. On this issue I decide against the Plaintiffs, for the same reason that I rejected their suit on the preceding one—namely, worthless evidence. It is unnecessary to consider the fifth point noted for trial, since, as concerning the merits, it would only become liable to adjudication in the event of the third and fourth issues being decided for the Plaintiffs. This case is certainly nothing less than a conspiracy. Independent of the circumstances, almost unpre-

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cedented in a high family holding large possessions, of two such contingencies occurring as a separation by divorce, and the impotence of the male heir, both of which are suddenly made public at the same time in a case of disputed succession, under Act, No. XIX. of 1841, notwithstanding that they are stated to have come about at a long interval of time one from the other, it is quite clear to me, from the evidence, both oral and documentary, filed by the Defendants, that they are the rightful and lineal heirs of *Ibrahim Khan*, and his brother, *Wuseer Jan*. It is, however, unnecessary to consider the evidence in detail, since the claim is in itself so inherently weak and fallacious as to be incapable of standing alone, and needs no argument to disprove it."

The Plaintiffs appealed from this decree to the *Sudder Dewanny Adawlut* at *Calcutta*.

The hearing of the appeal in the *Sudder Dewanny Adawlut* took place on the 22nd of *December*, 1857, when the Court, consisting of Messrs *B. J. Colvin*, *A. Sconce*, and *J. S. Torrens*, reversed the decree of the Judge of the *Zillah* Court, and pronounced the following judgment:—"We consider that the *onus probandi* in this case rests with *Gouhur Ali*, the Respondent, as he does not contest the position of the Appellants as uncles to deceased. They have, therefore, a clear right to share in his estate, unless *Gouhur Ali* can establish a valid marriage of his alleged father and mother, and his own birth as a son by that marriage. Now, the oral evidence adduced by him to prove these two facts is deficient in the requirements laid down in the decision of the 21st *May*, 1851. The witnesses were not, excepting one or two of them, members of the

family; of persons of consideration, and their depositions betray ignorance of circumstances which acquaintancè with the family would have brought to their knowledge. Thus, they could not tell *Alarukhee's* connections, or her father's name or residence, and similar particulars usually known regarding family relationship. Nor is the documentary evidence more satisfactory, for it consists of proceedings of Court in which *Gouhur Ali* appears as one of the parties in succession to *Ibrahim Khan*, but these are of dates subsequent to the decision in the Act, No. XIX. of 1841 case, dated the 30th of September, 1850, by which he was virtually acknowledged by rejection of Appellants' claim. Therefore, and for being in possession of the estate, he could sue or be sued without risk of challenge as to title. He can, however, derive no benefit from them in support of his present allegations. The Judge has based his judgment upon the insufficiency of the Plaintiff's witnesses to prove their denial of *Gouhur Ali's* filial relationship to *Wuseer Jan*; but, although they may have failed in this respect, it was for *Gouhur Ali*, who made the counter-assertion, to establish its truth. This he has not done; while the Appellants have advanced much to support their statement that *Wuseer Jan* had not been married, and, in consequence, that *Gouhur Ali* could not be his legitimate son. Great weight is due to the fact that no *Kabinamah* had been executed in the case of *Wuseer Jan*, as in that of his brother, *Ibrahim Khan*, and no recognition of *Gouhar Ali*, in any way, previous to the Act, No. XIX. of 1841 case, is shown to have been made, although fitting occasions for it had occurred on the death of *Wuseer Jan*, and when the *Tukseemnamah*

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was executed after *Aboo Mahomed's* death in 1840. We, therefore, reverse that portion of the decision of the Judge which recognizes *Gouhur Ali* as entitled to share in the estate of the deceased, in virtue of being the issue of the marriage of *Wuzeer Fan* and *Alarukhee*. But we see no reason to interfere with it as respects the recognition of *Khudijah Begum*, alias *Hosseinee Begum*, as the undivorced wife of deceased, as whose widow she must, therefore, be regarded; for no objection to the Judge's finding on this point has been raised in appeal before us. The estate of deceased becomes divisible, therefore, by Mahomedan law, as assented to by the Pleaders of both parties, as follows:—Reckoning it to consist of twenty-four parts, *Khudijah Begum*, the widow, or her heirs, will receive six parts; *Fatimatoonnissa*, or her heirs, will receive eight parts; while Plaintiffs, the Appellants, will receive ten parts between them, or five parts each. We, therefore, in reversal of the Orders passed in the Act, No. XIX. of 1841 case, adjudge to Appellants ten of twenty-four parts of the real estate of *Ibrahim Khan*, deceased, as sued for. We find, from the pleadings, that there is a contention between the parties relative to the value of the personalty left by deceased, and to the eight houses at *Dholepore*—whether they belonged to the estate or had been purchased by the private funds of *Fatimatoonnissa*. No decision having been pronounced upon these points by the Judge, a remand of the case for their disposal might have been necessary; but *Moonshee Amer Ali*, for Appellants, has waived all claims to both items of property. This decree is, therefore, restricted to awarding Appellants ten shares of the real estate,

They will receive proportionate costs of both Courts from *Gouhur Ali*, and will pay to *Khudijah Begum* her costs."

A petition for review of judgment was afterwards presented and refused.

The present appeal was from the above judgment.

The Solicitor-General (Sir *R. Palmer*), and Mr. *Leith*, for the Appellant.

It is an admitted proposition, that the burthen of proving the case lies on a Plaintiff, and we insist that, in the present instance, the *onus* of proof lay upon the Respondents, as they sought by the suit to eject the Appellant from the land in which he was in actual possession, and they also sought to set aside the decree of the *Zillah* Judge, and of the *Sudder Dewanny Adawlut* affirming that decree on appeal, which decrees confirmed the possession of the Appellant in the Respondents' summary suit brought under the provisions of the Act, No. XIX. of 1841. In the view taken by the *Sudder* Court, contrary to the opinion of the Judge of the *Zillah* Court, that the *onus* of proof lay on the Appellant, the justice of the case, as well as the practice of that Court, required that the suit should have been remanded to the *Zillah* Court, to take fresh evidence and for a new trial. The evidence of the Respondents' witnesses is, moreover, so unsatisfactory, that this Court cannot but remit the case to *India* for further proof.

Mr. *Field*, for the Respondents, *Khajah Wajed Hossein Khan*, and *Khajah Hoobeboollah Khan*,

Insisted, that the Appellant had failed to prove his

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alleged heirship, an legitimate son of *Wuzcer Jan* by *Alarukhee*, by satisfactory evidence. On the contrary, that the evidence established the fact, that *Wuzcer Jan* was a person of weak intellect from his birth, and moreover, a cripple and impotent, and, notwithstanding efforts made to cure him, he remained so till his death; and that consequently he was never married, and died childless during his father's lifetime, and that there is not the slightest trace of any recognition of the Appellant by any of the members of the family, as the son of *Wuzcer Jan*.

Judgment was reserved and now delivered by

29th July,  
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The Right Hon. Lord KINGSDOWN.

It is with great regret that their Lordships in this case find themselves unable to dispose of the case upon the evidence as it stands.

The facts on each side are such that they must, from their very nature, be capable of clear and distinct proof. If *Abdool Kadir Khan*, alias *Wuzcer Jan*, was the miserable object which has been described by the Respondents, it must have been a fact known not only to all the members of the family, but to the medical men who attended him, and to all respectable people in the neighbourhood who were in the habit of associating with him. On the other hand, if he was a married man and contracted a legal marriage with *Alarukhee Begum*, as is alleged, and the son of that marriage lived in the family, and on the death of the father was acknowledged as his heir, that is a fact which must be equally capable of proof. Unfortunately the witnesses on both sides are of such a character that it is impossible for the Court to place any reliance upon their testimony.

The Judge of the *Zillah* Court has pronounced in the strongest terms his opinion, that the Appellant in this case is entitled, and that the case against him is a conspiracy (a). But instead of stating the grounds upon which he arrived at that conclusion, he confines himself to alleging that as his opinion, and that he has no doubt about it. He has not afforded to the Court that assistance which it is entitled to expect, and which I believe by the Regulations he is bound to afford. On the other hand, we cannot say that the *Sudder* Court has proceeded in a manner which is entirely satisfactory. They hardly seem to have allowed sufficient weight to the circumstance that the Respondents (who are the Plaintiffs) were the parties who had to make out the case. They have not only to prove their relationship, which is not disputed, but their heirship, which depends upon the illegitimacy of the Appellant; and they must give sufficient general evidence to throw upon him the *onus* of proving his legitimacy.

Their Lordships, therefore, must advise Her Majesty to remit the case to *India*. Probably the proper Order will be, to affirm the decree of the *Sudder* Court, so far as it reversed the decree of the *Zillah* Judge, to reverse the *Sudder* decree in other respects, and to remit the cause to the *Sudder* Court, with directions that they shall send it back to the *Zillah* Court to receive such further evidence as either party may offer, and to proceed afterwards to the regular hearing and adjudication of cause.

There will be no costs in this appeal.

(a) *ante*, p. 497.

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 KHAN ... .. } *Appellant,*

AND

KHAJAH AHMED KHAN, 'the heir-  
 at-law of KHUDIJA H BEGUM, }  
 deceased ... .. } *Respondent.\**

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For marginal  
 note, see *ante*,  
 p. 492.

THIS also was an appeal from a decree of the *Sudder Dewanny Adawlut* at *Calcutta*, dated the 22nd of *December*, 1857, affirming the decree of the Judge of the Court of the City of *Patna*, by which a suit brought on behalf of this Appellant, then a minor, by his mother and guardian, was dismissed, with costs. The suit was instituted under the 17th sec. of Act, No. XIX. of 1841, against *Khudijah Begum*, since deceased, for the reversal of two several Orders, the one an Order of the Judge of the City of *Patna*, made in a summary suit in which the Defendant was the Petitioner, and brought by her under the Act, and the other an Order of the *Sudder Dewanny Adawlut* affirming the same. These Orders simply retained *Khudijah Begum* in the possession of certain property, both real and personal, forming part of the estate of the late *Ibrahim Khan*, deceased, the Appellant's paternal uncle, and in which property the *Begum* claimed to be entitled to a one-fourth share, as his widow, according to the Mahommedan law,

\* Present; Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

*Assessors*.—The Right Hon. Sir Lawrence Peel.

alleging herself to have continued the wife of the deceased up to the time of his death, which allegation was denied by the Appellant.

The case arose out of the previous appeal, and was heard at the same time, and involved a similar issue. As the Respondent did not appear, the appeal was heard *ex parte*.

The Solicitor-General (Sir R. Palmer), and Mr. Leith, appeared for the Appellant.

Their Lordships, after delivering judgment in the previous appeal (a), said, that with respect to the decision in this case, it must stand over until the result of the proceedings in the previous case was known, the Appellant being the same in both cases; and intimated that if the Appellant did not make out any title in the other case, he would have no interest in this.

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(a) *Ante*. p. 502.

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RAMALINGA PILLAI

... *Appellant*,

AND

SADASIVA PILLAI

... *Respondent*.<sup>1</sup>

*On appeal from the Sudder Dewanny Adawlut, at  
Madras:*

3rd & 4th  
Feb., 1864.

Adoption  
by a childless  
Hindoo of the  
*Vaiyyas*, or  
third class of  
Hindoos, of  
his sister's  
son, upheld.

THE sole question in this appeal was, whether the Respondent was the adopted son of one *Shanmuga Pillai*. The Respondent was the son of *Chengamalam*, the sister of *Shanmuga Pillai*.

The Respondent filed a plaint in the Civil Court of *Cuddalore* against *Chedumbara Pillai* and *Tillai Pillai*, his brother-in-law, and thereby claimed to recover the property pertaining to his one-half share, consisting of lands assessed at Rs. 3,099. 3a. 9p. a year; houses, &c., valued at Rs. 6,378. 2a. 3p.; cattle, valued at Rs. 740; jewels, &c., worth Rs. 4,288. 4a.; and ready cash Rs. 26,500; with the right of recovering outstanding debts, estimated at Rs. 3,850. 8a.; amounting in the whole to Rs. 49,881. 10a. The statements in the plaint were, in substance, as follows; that *Shanmuga Pillai* was issueless, and that, having fallen sick

<sup>1</sup> Present; Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

*Assessors*,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

in *Ani of Khara* (July, 1831), he, in the presence of his two wives, adopted the Respondent and died a few days afterwards; that, as the family was undivided, the Respondent was maintained by *Muruga Pillai*, the elder brother of *Chedumbara Pillai*, and, after his death, by *Chedumbara Pillai*; that the funeral ceremonies of *Shanmuga Pillai* were performed by the Respondent by proxy on account of his youth; that the Respondent had performed the annual funeral ceremonies of *Shanmuga Pillai* and of other members of his family; that the Respondent and *Chedumbara Pillai* were equally entitled to the family property, and that the Respondent had been in the habit of joining in the management of the estate; and further stating that *Chedumbara Pillai* had refused to allow the Respondent his share of the property, and that he had been induced so to refuse by *Tillai Pillai*, the other Defendant. *Tillai Pillai*, by his answer, disclaimed any interest in the property.

*Chedumbara Pillai*, by his answer alleged, that *Shanmuga Pillai* never adopted the Respondent; that *Shanmuga Pillai* died of cholera the day after he was attacked; that the Respondent's father died of cholera four days prior to the death of *Shanmuga Pillai*, and could not have given the Respondent in adoption as alleged; that *Shanmuga Pillai* was under pollution on account of the death of a relative at the time of the alleged adoption, and, therefore, could not have made any such adoption; that the Respondent was of a different *gotram*, and could not have been adopted consistently with Hindoo law; that the funeral ceremonies of *Shanmuga Pillai* were performed by *Chedumbara Pillai*, and not by the Respondent; that *Shanmuga Pillai* did not die in *Ani of Khara* (July, 1831), but in *Ani of Mandana* (July,

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1832); that the Respondent, being the brother-in-law of *Chedumbara Pillai*, was employed by him in the management of the property, and was dismissed for improper conduct; that the Respondent had caused a false statement to be introduced in certain depositions made by *Chedumbara Pillai*, and had, by trickery, obtained a copy of the depositions; that *Chedumbara Pillai* had no ready cash, and that there were no family jewels as mentioned in the plaint.

A supplemental plaint was filed, correcting the date of the adoption and death of *Shanmuga Pillai*, and *Chedumbara Pillai* filed a supplemental answer, in which he pleaded that the Respondent attained the age of discretion in *September*, 1845, and that twelve years and four months had intervened between that date and the date of plaint, and that, consequently, the suit was barred by the Regulation of limitations cl. 4, sec. XVII., Reg. II. of 1803.

A replication and a rejoinder upon the question of the bar by the Regulation of limitations were filed by the respective parties.

Witnesses were examined. Their testimony was contradictory. The Respondent's witnesses deposed to the actual adoption of the Respondent by *Shanmuga Pillai*. Seven of those witnesses, one of whom was the second wife of *Shanmuga Pillai*, declared that they were witnesses of the adoption, that all the ceremonies necessary to render the adoption valid were duly performed, that *Sinevasa Pillai's* death took place a month before such adoption, and that *Shanmuga Pillai* did not die until four or five days after the adoption. Other witnesses deposed to the fact that the Respondent, at first by proxy, and afterwards in person, performed the funeral ceremonies of *Shanmuga Pillai* and of his elder wife. The Respondent filed three

depositions of the Defendant, dated the 6th of *April*, 1853, the 5th of *December*, 1853, and the 25th of *August*, 1854, before the *Sheristadar* in respect of a security Bond, containing admissions by him of the fact of adoption of the Respondent. Five of the witnesses for Defendant, *Chedumbara Pillai*, declared that they were present at *Neytāssal* at the time when the adoption was stated to have taken place, and denied that there was any such adoption. Those witnesses and five others also declared that the funeral ceremonies of *Shanmuga Pillai* were performed by *Chedumbara Pillai* as the sole surviving relative. Several of his witnesses stated to the effect, that a relative named *Ambalavana Pillai* died two or three days before *Shanmuga Pillai*, and that the Respondent could not have been given in adoption by his father, and could not have been adopted, as he was under pollution, and that *Shanmuga Pillai* was also under pollution from some time previously to his death until his death, on account of the death of a relative, so as to prevent the exercise by him of the power of adoption.

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On the 16th of *June*, 1859, the Civil Judge, Mr. *George Ellis*, decreed in favour of the Respondent, holding, first, that the Regulation of Limitations did not apply, on the ground that the cause of action only arose on the refusal of the Defendant to consent to a partition of the property, and that, supposing the parties to be members of an undivided family, the time did not run between co-parceners until the refusal of a demand for partition, which was only made one year before the suit, and finally held that the adoption of the Respondent by *Shanmooga Pillai* was proved; principally relying upon the before-mentioned three depositions of the Defendant, as containing a conclusive admission by him of such adoption.

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From this decree the Defendant, *Chedumbara Pillai* appealed to the *Sudder Dewanny Adawlut* at *Madras*; and that Court, consisting of Messrs. *H. D. Phillips* and *H. Frere*, on the 29th of *August*, 1860, dismissed the appeal with costs, considering that (without entering into any of the objections to the alleged adoption) the Defendant, by express written admissions, had recognized the fact and validity of the adoption, the Court relying upon the three depositions on which the Civil Court had rested its judgment.

From this decree the present appeal was brought.

Pending the appeal the Defendant, *Chedumbara Pillai*, died leaving the Appellant, his heir.

The appeal was argued by

The Attorney-General (Sir *R. Palmer*), and Mr. *W. W. Mackeson*, for the Appellant.

Mr. *W. H. Melvill* appeared for the Respondent, but was not called on.

The Appellant's case was, first, that the adoption of the Respondent by *Shanmuga Pillai* was not proved, the genuineness of the three depositions being impeached by him as fabricated documents; and it was contended, that even if they were established, the admissions of the adoption in those depositions were not conclusive. Mr. Justice *Bayley's* ruling in *Heane v. Rogers* (a) was referred to on this point, where it was laid down, that the express admissions of a party to the suit, though evidence against him, yet he was at liberty to prove that such admissions were mistaken, or were untrue, and was not estopped or concluded by such admissions. *Lord Londesboroughs, case* (b), *Taylor* "On evidence," Vol. I., § 741 [3rd edit.], was also

(a) 9 Barn. & Cress., p. 586. (b) 4 De Gex, Mac, & Gor., 411.

referred to. Secondly, that the adoption, if proved as a fact, was illegal ; (1) from impurity, as *Shanmuga Pillai* was under pollution from his father's, *Sinevasa Pillai's* death, and then incapacitated from engaging in the religious rites necessary to an adoption. *Strange's* "Manual of Hindoo Law," § 63, p. 18 [2nd edit.], his death, it was alleged, having taken place only six or seven days previous to the adoption ; the custom in the family, as deposed to by the witnesses, being to observe pollution for fifteen or sixteen days ; and (2) as the Respondent and *Shanmuga Pillai* were *Vaisyas*, among which class adoption of a sister's son was forbidden, 1 *Strange's* "Hindu Law." pp. 83-84 [2nd edit.], referring to *Datt, Mim. sec. ii, par. 32*, and note on *Id.* § 102.

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Their Lordships' judgment was delivered by

The Right Hon. Lord CHELMSFORD.

This is an appeal from the decree of the *Sudder* Court at *Madras*, affirming a decree of the Civil Court of *Cuddalore*, by which the Respondent was declared to be entitled, as the adopted son of *Shanmooga Pillai*, to a moiety of certain family property, both real and personal. The only question argued before us has been, whether there was a valid adoption of the Respondent. The Counsel for the Appellant not only questioned the fact of the adoption, but also contended, that no legal adoption could have taken place, as at the time it is alleged to have occurred, *Shanmuga Pillai* was under pollution in consequence of the recent death of a relative, *Sinivassa Pillai* ; and they also alleged, that the adoption was illegal, as the Respondent was the adopter's sister's son,—but upon this latter objection very little was

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said. Upon the fact of the adoption, it appears {from the evidence, that *Shanmuga Pillai* having been attacked with cholera at *Neyvasal*, where he had gone a few days previously, the parents of the Respondent, hearing of the illness, took the Respondent, then an infant of a year and a half old, to *Neyvasal*, where on the day previous to the death of *Shanmuga Pillai*, certain ceremonies were proved to have taken place which were sufficient to constitute an actual adoption. Several witnesses, whose testimony is not directly impeached, deposed to these facts, but it was urged in argument, that many other persons were present on the occasion who ought to have been produced on the part of the Respondent. Where, however, there is sufficient evidence of a fact, it is no objection to the proof of it, that more evidence might have been adduced. There is not only no impeachment of the credit of the witnesses who speak to the fact of the adoption, but the circumstances under which they allege it to have taken place are highly probable. It appears, that there had been some promise made by the parents of the Respondent that they would give their son to *Shanmuga Pillai* for adoption, and nothing is more natural than that hearing of the illness of *Shanmuga Pillai*, they should have taken the infant to him in order to secure the adoption, which had been previously proposed. There can be no fair ground, therefore, for discrediting the witnesses who prove the actual adoption.

But the Appellant's Counsel contended, that assuming the fact of an adoption of the Respondent, it could have no validity on account of his being the son of a sister of *Shanmuga Pillai*, and also because *Shanmuga Pillai* was under pollution in consequence of the death of his relative, *Sinivassa Pillai*. It

appears that the period of pollution, according to Hindoo law and custom, is sixteen days, and proof was given that the death of *Sinivassa Pillai* took place a month before the act of adoption of the Respondent. The Appellant, on the other hand, proved by several witnesses, that *Sinivassa Pillai* died only six or seven days before *Shanmuga Pillai*, and he produced to the same effect a copy of a leaf from a Book kept by the Brahmins for recording the time of the deaths of persons for whom annual ceremonies were to be performed. There was thus a conflict of evidence as to the time of *Sinivassa Pillai's* death, and it was for the Courts below to determine upon which set of witnesses they could best rely. There are, however, certain documents produced in evidence, which, if genuine, would appear to leave little doubt upon which side the balance ought to incline. These consisted of three depositions made by the Appellant's father upon the occasion of his becoming surety for persons appointed to the office of *Sharistadar*, in all of which, in answer to inquiries directed to ascertain the value and other particulars relating to the lands offered as security, he stated that "the Respondent was the adopted son of the deceased *Shanmuga Pillai*, and that there were no other co-parceners." The Appellant's father, however, upon being called as a witness by the Plaintiff (the Respondent), and these documents being shown to him, swore that the signatures to them were not his, and upon looking into the depositions themselves, said as to each, that "as to the deposition stated about adoption," it was not made by him. The learned Counsel for the Appellant disputed the genuineness of the documents on another ground. In the course of the proceedings in the Courts in India, alleged copies of these documents were put in

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evidence, which, though substantially agreeing with the supposed originals, yet varied in certain particulars as to the signatures and as to the names and number of the witnesses.

If should be observed that these discrepancies between the copies and the originals, which at present are inexplicable, were not pointed out to the Courts in *India*, where possibly a satisfactory explanation might have been given of them. It is difficult to understand, however, what bearing these variations in alleged copies can have upon the genuineness of the original documents, nor is it easy to discover when and how and by whom the alleged fraud upon the originals could have been committed. In the opinion of the Judge of the Civil Court, the documents bear no traces of having been tampered with or fabricated, and the Appellant's father swears that they were not signed by him, therefore, it must be supposed that the official persons who took the securities from the Appellant's father after he had signed the depositions substituted others for them, or that afterwards the Respondent, or some one on his behalf, induced the person who had the legal custody of them to give them up, and receive the fabricated ones in their stead. The Appellant's Counsel also contended, that the documents are shown not to have been genuine; from the fact of the securities having been taken from the Appellant's father alone; and they referred to a Circular Order containing instructions to the Collectors, as to the security to be given by public servants, in which they are required "to ascertain whether the property offered in security is free from mortgage, lien, &c., and whether the cousins (of the persons offering securities), if there be any, are willing to tender such securities and obtain from them *Kara-*

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*mamaks* to the same effect," and urged, that as the depositions produced show that there was an adopted son who was a co-parcener with the Appellant's father, it was not likely that the Collectors would have so entirely disregarded their instructions as not to have obtained additional security. If, however, the Collectors were satisfied that the portion of the property belonging to the Appellant's father was an ample security, they might be a little remiss in this respect; but at all events if the choice as to the integrity of these documents lies between a slight dereliction of duty on the part of the Collectors, or a gross fraud committed by them, or by some other persons for the benefit of the Respondent, there is little difficulty as to the conclusion which ought to be adopted. If the genuineness of the depositions is established, of which their Lordships entertain no doubt, they are decisive of the case. In them the Appellant's father three times deliberately styles the Respondent an adopted son. Now, if there were no adoption at all, or if the actual adoption were for any reason legally invalid, the Respondent would of course not be entitled to that designation. They amount, therefore, to a complete admission of the whole title of the Respondent, both in fact and in law, and show that the objections which have been urged to his claim, in the opinion of the Appellant's father, who probably was well acquainted with all the circumstances, and may be assumed to have known the Hindoo laws and customs, had no foundation. Their Lordships, therefore, will recommend to Her Majesty to affirm the decree appealed from, and to dismiss the appeal, with costs.

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VENAYECK ANUNDROW and others ... *Appellants*,

AND

LUXUMEEBAEE and others ... *Respondents*.

*On appeal from the Supreme Court at Bombay.*

16th & 17th  
Feb., 1864.

According to the law of inheritance prevailing in *Bombay*, sisters succeed to the estate of their deceased brother, if the estate has been separately acquired by their father, in preference to their father's brothers' sons.

THE Appellants filed a Bill in the Supreme Court at *Bombay* against the Respondents. The Bill stated, in effect, first, that *Bhugwantrao Vencajee* was a Hindoo inhabitant of *Bombay*, and the possessor of large moveable and immoveable property, and died in *May*, 1851, leaving a widow, the Respondent, *Luxumeebaee*, and three daughters, *Naneebaee*, *Soon-drabaee*, and *Socabaee*, the other Respondents, and also an infant son, *Gujanon*, who died in *June*, 1853, at the age of little more than two years; secondly, that *Bhugwantrao Vencajee* made a Will in the English language, by which he appointed the Respondent, *Luxumeebaee*, Executrix; the material part of the Will, so far as it related to the question raised by the Bill and the present appeal, was as follows:—  
“ All the outstanding debts due to me must collect,

° Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

*Assessors*,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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and, after paying legal debt due by me, and the expense of the funeral and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, &c., I give and bequeath to *Luxumeebaee*, my dearly beloved wife, and my little son, *Gujanon*, an infant; the joys, &c. I have made for my wife and children, they belonging themselves respectively;” third, that the Executrix had proved the Will, and possessed herself of the property; fourth, that the Plaintiffs were the sons, sole heirs and legal personal representatives, according to the Hindoo law, of *Anundrow Vencajee*, the Testator’s sole brother, who died in May, 1853, after the Testator, but a little before *Gujanon*; fifth, that as such, they were the ultimate sole heirs and legal personal representatives, both of the Testator and his infant son, and were, according to the Hindoo law, absolutely entitled to all his property, subject only to a life interest in his widow; and sixth, that the Executrix had been guilty of certain acts and omissions prejudicial to the estate, and of which the Plaintiffs had a right to complain, such as lending part of it without security to her father, making improper investments, selling immoveables, and the like; and the Plaintiffs charged that the Respondent, *Luxumeebaee*, was only entitled to a life estate in the estate and effects of her deceased husband, either under the Will, or according to Hindoo law, and that the Will, if it purported to give the Respondent, *Luxumeebaee*, a larger estate than an estate for life, was inoperative and void as against the Plaintiffs, according to the Hindoo law; and the Plaintiffs further charged that they were the ultimate sole heirs and legal personal representatives of *Ehugwantrao Vencajee*.

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and his son, *Gujanon*, according to the Hindoo law, and that they, the Plaintiffs, were entitled, upon the decease of the Respondent, *Luxumeebaee*, to take and enjoy the whole of the estate of *Bhugwantrao* and his son, in undivided shares, as and for an estate of inheritance; and the Bill further charged, that whatever might be the quantity, or the quality of the estate vested in the Respondent, *Luxumeebaee*, and formerly belonging to her deceased husband, she had no power of disposing of the same, or, at least, of the immoveable part of the same, by Will, or otherwise, and that the same, after the decease of the Respondent *Luxumeebaee*, would devolve, according to the Hindoo law, upon the Plaintiffs, as remainder-men, for an estate of inheritance; and the Bill prayed for a declaration of the Plaintiffs' title, that the estate might be accounted for and secured, and the Executrix restrained from wasting it.

To this Bill a demurrer was filed by the Defendants. The grounds of demurrer were, first, that the Plaintiffs had not by their Bill shown that they were the heirs or legal personal representatives of the above-named *Bhugwantrao Vencajee*, or of his son, *Gujanon*, according to the Hindoo law; or that the Plaintiffs, or any of them, were entitled, upon the decease of the Respondent, *Luxumeebaee*, to take and enjoy the whole or any part of the estate of *Bhugwantrao Vencajee*, or his son, in undivided shares, or otherwise, as or for an estate of inheritance, or any other estate; or to take or enjoy any of the rents, profits, or proceeds thereof respectively; or that they the Plaintiffs, or any of them, were interested in the accounts of or in the premises, or any of them; secondly, that the husbands of the Re-

spondents, *Naneebaee*, *Sundrobaee*, and *Socabae*, were not parties to the suit; and lastly, for want of equity generally.

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The demurrer was heard before the Supreme Court, consisting of Sir *Matthew R. Sausse*, Chief Justice, and Sir *Joseph Arnould*, on the 22nd of *February*, 1861: It appeared that the Plaintiffs' claim as to the immoveable property was alone pressed in argument at the hearing, that as to the moveable property being tacitly abandoned. On the merits of the case, as distinguished from the point of pleading, it was contended on the part of the Respondents, first, that under the Will of the Testator, whose power to dispose of the estate was not questioned in argument by the Appellants, the Respondent, *Luxumeebaee*, and her infant son took an absolute interest in the entirety as joint tenants, and that, on the death of the son, the mother became absolutely entitled by survivorship; secondly, that the Respondent, *Luxumeebaee*, as the sole heir of her son, *Gujanon*, at the time of his death (which it was not denied that she was), became entitled to everything of which he was absolute owner, and that, consequently, if the Respondent, *Luxumeebaee*, and her son, took as tenants in common, and not as joint tenants; the result was the same as if it had been a joint tenancy; lastly, it was contended that the Respondents, *Naneebaee*, *Soondrobaee*, and *Socabae*, the sisters of *Gujanon*, and not the Plaintiffs, his paternal first cousins, were his heirs according to the Hindoo law. The objection, for want of parties, was also pressed.

The judgment of the Court, allowing the demurrer, was delivered on the 21st of *March*, 1861, by the Chief Justice as follows:—"The case set up by

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the Bill is as follows:—*Bhugwantrao Vencajee*, (the deceased husband of the Defendant, *Luxumeebaee*, and the deceased father of the three other Defendants) and one *Annundrow Vencajee* (the deceased father of the Plaintiffs) were brothers, and, as the Bill alleges, the sons and sole heirs and legal personal representatives, according to the Hindoo law, of one *Vencoba Mancojee*. *Vencoba Mancojee* died intestate in 1832. *Bhugwantrao Vencajee* died in *May*, 1851, leaving, as the Bill, in the third paragraph, alleges, his brother, *Annundrow Vencajee*, the Defendant, *Luxumeebaee*, his widow, the other Defendants, *Naneebaee*, *Soondrabae* and *Socabae*, his three daughters, and one son, *Gujanon*, then an infant of the age of about three months, him surviving. He left, also, considerable property, both moveable and immoveable, and a Will, to be more particularly noticed presently. *Annundrow Vencajee*, the brother of the Testator, and the father of the Plaintiffs, died in *May*, 1853, having made a Will (not set out), and leaving the Plaintiffs his sole heirs and legal personal representatives him surviving. *Gujanon*, the infant son of the Testator, died in *June*, 1853, leaving the Defendant, *Luxumeebaee*, his mother, the other Defendants, his sisters, and the Plaintiffs, his cousins, him surviving. The Will of *Bhugwantrao Vencajee*, which is very short, is set out in the sixth paragraph of the Bill. By this instrument, after making provision for the due celebration, according to Hindoo law, of his funeral rites and ceremonies, he directs his wife to get his three daughters, *Naneebaee*, *Soondrabae*, and *Socabae*, married at reasonable charges, to collect outstandings and pay debts, to defray the expenses of his funeral and other ceremonies during the first year

after his death. He then devises as follows :—' The remainder property, both moveable and immoveable, &c., I give and bequeath to *Luxumeebaee*, my dearly beloved wife, and my little son, *Gujanon*, an infant ; the joys, &c., I have made for my wife and children, they belonging themselves respectively [meaning apparently they belong to them respectively]. I do hereby constitute and ordain *Luxumeebaee* sole Executrix of this my last Will and Testament. She will manage the whole affairs of my estate and property, but by the advice and consent of my father-in-law, *Bhasker Shamjee*, until my little son, *Gujanon*, attain to his proper age.' Such are the material portions of the Will. *Luxumeebaee*, the Bill alleges, immediately after her husband's death, took possession of the whole of his moveable and immoveable estate, and in July, 1851, took out probate of his Will. It is alleged by the Bill that she has paid all her deceased husband's debts and funeral expenses, had got his three daughters (the co-Defendants) suitably married, and defrayed their marriage expenses out of his estate. The Bill charges that *Luxumeebaee* is not entitled, either under the Will, or by the Hindoo law, to more than a life estate in the estate and effects of her deceased husband ; that the Will, if it purports to give her more than a life estate, is void as against the Plaintiffs, who, according to Hindoo law, are the ultimate sole heirs and legal personal representatives of their deceased uncle, and of his deceased son, *Gujanon* ; and that, as such, they are entitled, on the decease of *Luxumeebaee*, to take and enjoy the whole estate of *Bhugwantrao* and his son, in undivided shares, as and for an estate of inheritance. The Bill then alleges against *Luxumeebaee*, in her management of the estate, various acts and

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omissions in the nature of waste, and also charges her with attempting to adopt one of her brother's sons, as the son and heir of her deceased husband. The Bill then prays, amongst other things, that the Plaintiffs may be declared entitled to the estate and effects of which *Bhugwantrao Vencajee* died possessed, or at least of so much thereof as consists of immoveable estate, as the ultimate heirs thereof in remainder for an estate of inheritance. That the Defendant, *Luxumeebaee*, may be restrained by injunction from selling or disposing of any part of the estate, from committing waste, and from adopting one of her brother's sons. It further prays for an account, and for a receiver, if necessary. To this Bill the Defendants have demurred, on the grounds, that the Plaintiffs have not shown themselves to be, according to Hindoo law, heirs or legal personal representatives of *Bhugwantrao Vencajee*, or his son, *Gujanon*, or that they or any of them are or is entitled, on the decease of *Luxumeebaee*, to take and enjoy the whole or any part of the estate of *Bhugwantrao*, or his son, in undivided shares, or otherwise for an estate of inheritance or for any other estate; or that they or any of them are or is interested in the account as prayed. There is a further ground of demurrer for want of parties, in respect of the non-joinder of the husbands of the three daughters, which, on the view the Court takes of the case, it will not be material to consider, for, in our opinion, the Defendants are entitled to succeed on the other grounds on which they have relied. It was admitted that the property which was the subject of *Bhugwantrao's* bequest and the present suit, must be taken upon the pleadings to have been (as in fact it was) separately acquired property by him. Although

alleged in the Bill, yet it was not contended before us in argument, that *Bhugwantrao* had not an absolute disposing power over his separate estate. No question was, in effect, raised as to *Luxumeebaee's* right to take the moveable property absolutely. It appears to us that the devise may be construed as giving to *Luxumeebaee* and *Gujanon*, first, either a joint tenancy for life; or second, a tenancy in common for life; or third, a joint tenancy in *quasi* fee; or fourth, a tenancy in common in *quasi* fee. If the first construction be adopted, *Luxumeebaee* takes a life interest in the entire estate by survivorship, and the reversion vests as an undisposed of residue in *Bhugwantrao's* heir, who was *Gujanon*, and upon the death of the latter it went to his, *Gujanon's* next heir. On the second construction, *Luxumeebaee* would take her moiety for life, and *Gujanon's* share would, with the reversion in *Luxumeebaee's* moiety upon his death, descend upon his next heir. On the third construction, *Luxumeebaee* would take under the Will an absolute interest by survivorship in the residue. On the fourth construction (that of a tenancy in common in *quasi* fee), *Luxumeebaee's* share vested in her absolutely, and on *Gujanon's* death his moiety descended upon his next heir. The substantial question for decision is, in whom, upon the pleadings as they stand, is the absolute interest in the property of *Bhugwantrao Vencajee* now vested? According to all the authorities recognized at this side of *India*, *Luxumeebaee*, as mother of *Gujanon*, became his heir, and if she were to take an absolute estate in the property, the Plaintiffs could have no title. The *quantum* of estate which she is allowed to take in the character of heir to her son is not free from doubt; although

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in the category of those who take as heirs to a separated brother, there is no distinction or difference made between the *quantum* of estate taken by a mother from that taken by a son, a father, a brother, or any other relative, who admittedly takes in such an inheritance the most absolute estate known to Hindoo law.—(See *Menu*, *Yaynyawalcya*, *Mitacshara*, ch. II, sec. iii.; *Mayucha*, ch. iv. sec. 8, &c.). Where the *quantum* of estate has been cut down to a life interest, when the inheritance descends upon a female, it must be ascribed to the influences of usage, as the restriction is not to be found in the early Canons of inheritance. In *Dencooverbai's* case (a), this Court held that the widow of an intestate, childless, and separated brother, took the moveable property absolutely, and the immoveable for life only, with remainder to the heirs of the intestate. That decision was very much based upon the principle of allowing the law of usage to control the letter of that portion of the written law which was in favour of the widow. See *Mitacshara*, 'On Inheritance,' ch. II., sec. i., where the order of succession is declared; and par. 39, of that section where the Commentator, after discussing all the various opinions, sums up in conclusion, as follows:—'Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, having separated from his co-heirs and not subsequently reunited with them, dies leaving no male issue.' However, in the view which we take of this case and for the purposes of this demurrer, it will not be necessary to decide whether a mother takes by inheritance from her son the absolute interest, or an estate for life only; that she is entitled to the latter may be taken to be conceded upon the pleadings, and

(a) See *post*, p. 528.

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there cannot, in our opinion, be any doubt upon that point at this side of *India*. Supposing, then, *Luxumeebaee* to take a life estate only in the descended inheritance, the reversion vests in the next heir of *Gujanon*, and upon the best authorities recognized in this Presidency, that heir is his sisters, who are Defendants in this suit. This appears, from *Mayucha*, ch. iv., p. 19, where, after enumerating the mother (see pp. 14 and 15), the uterine brother and his sons (secs. 16 and 17), the paternal grandmother (sec. 18), (and no paternal grandmother of *Gujanon* is shown to be in existence on the face of this Bill), the Commentator, in sec. 19, proceeds thus:—‘In default of her (the paternal grandmother) comes the sister, under this text of *Menu*. To the nearest *Sapinda* (male or female) after him (or her) in the third degree, the inheritance next belongs, and thus of *Bruhuspitia*, where many claim the inheritance of a childless man, whether they may be paternal or maternal relations or more distant kinsmen, he who is the nearest of them shall take the estate.’ And the next rank is hers (the sisters), both from her being begotten under the brother’s family name and there being no further reservation with respect to the gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of kin she succeeds. Considering the high authority of the *Mayucha* on this side of *India*, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain Commentators on the *Mitacshara*, the sister comes next in order of inheritance after the brother.

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The passage in the *Mitacshara* is contained in the first paragraph of ch. II., sec. iv.: 'On failure of the father, brethren share the estate.' *Nanda Pandita* and *Balam-Bhatta*, says Mr. *Colebrooke* in his note to this passage, consider that, as including 'brothers and sisters,' in the same manner in which 'parents' have been explained 'mother and father,' and conformably with an express rule of grammar (*Panini*, sec. 12, 68). They observe, that the brother inherits first, and, in his default, the sister; this opinion, Mr. *Colebrooke* states, is 'controverted by *Camalacara* and the author of *Vyavahara-Mayucha*. It certainly is so in sec. 16 of chaps. iv. and viii. of the *Mayucha*, p. 105; but, it should be observed, that in p. 15 of the same commentary the doctrine of the *Mitacshara*, now generally regarded as established as to the words 'parents' including both 'mother and father,' is controverted, and on precisely the same grammatical grounds. Sir *Thomas Strange*, vol. I., p. 146 [2nd edit.], after stating generally that the sister is excluded from succession, adds:—'Such appears to be the law of the *Bengal Provinces*; but is not to be taken as universal, opinions existing, that the term 'brethren' in the enumeration of heirs in the *Mitacshara*, includes 'sisters,' as 'parents' have been seen to do 'father and mother;' but, observes Sir *Thomas Strange*, 'they stand controverted.' For this position he refers to the Appendix in his 2nd vol., ch. vi., pp. 243, 244, and especially to the remark of Mr. *Colebrooke* there printed. In the passage thus referred to Mr. *Colebrooke* observes, 'Commentators on the *Mitacshara* allow the sister to come in, on failure of brothers. This opinion is, however, controverted,' and, to show that is so,

Mr. *Colebrooke* refers to the very passage already cited from the *Mitacshara*, from Mr. *Colebrooke's* notes to which it appears that one of the two authorities cited as controverting the position is the *Mayucha*; and, on reference to the *Mayucha*, it further appears that, the opinion as to the generic word 'brethren' including 'sisters,' is controverted there on precisely the same grammatical grounds on which the same authority had controverted the opinion, that the generic word 'parents' includes the mother; which latter opinion Sir *Thomas Strange* regarded as well established. The expression, therefore, in Sir *Thomas Strange's* first volume, that the opinion in question stands controverted (it by such an expression be meant, is conclusively or finally controverted), must be regarded as too strong. A similar construction should apparently be given to the words 'parents' and 'brethren.' He no doubt adds, on the authority of Mr. *Colebrooke*, that *Jagannatha* observes, it is now here seen that sisters inherit the property of their brothers; but *Jagannatha*, whatever the case may be on the other side of *India*, is not of binding authority on this. It would, on the whole, appear a safe proposition to lay down that, in this part of *India*, even if the opinion be not established, that the term 'brethren' includes 'sisters,' and, therefore, if sisters do not inherit on failure of brothers or brothers' sons, yet, at all events, that the doctrine of the *Mayucha* must be held to prevail, and that sisters come next in succession to the paternal grandmother. Either doctrine, however, will entitle the sisters to succeed to the inheritance of *Gujanon* upon the death of *Luxumbae*. As to the mode in which the sisters take, it

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would appear, by analogy, that they take as 'daughters.' In a passage from the Commentary of *Nanda Pandita*, cited by Mr. *Colebrooke* in his annotations, in par. 5 of the 5th section of the second chapter of the *Mitacshara* (p. 351), occur these words: 'The daughters of the father and other ancestors must be admitted, like the daughter of the man himself, and for the same reason'; but the daughters of the man himself take absolutely, and so, therefore, do the sisters. In *Deucooverbaee's* case (a)

(a) The judgment of the Chief Justice *Sausse* in this case, *nom. Pranjeevandass Toolseydass v. Deucooverbaee*, was transmitted with this appeal, and was, in its material parts, as follows:— "In this suit there are two grounds of claim: first, that the Plaintiffs were entitled to property as members of an undivided family; second, that even if *Ramdass* was to be considered as having separate estate, yet that he willed it in such a way to charity that the bequest was void for vagueness, and, therefore, they, the Plaintiffs, were entitled to come in as heirs with *Bhugwanass*. I have already decided and given reasons for thinking that the property was not undivided, but separate property, and, therefore, that *Rajudass* had power to will it away, and that his Will operated on it. So far the Plaintiffs' case failed, and they ought then to show they had a *locus standi* in Court as heirs under a void bequest. The first question remaining is, whether this devise is a good charitable devise.—[Here followed the reasons for holding that the devise was void, and that the property became undisposed of residue, according to the Hindoo law.]—The Testator left a widow and daughters, and we must consider first what estate the widow took, the husband dying leaving separate property. I have left considerable difficulty in coming to any decision, as the schools are so conflicting, and it is difficult to follow the reports of the *Adawlut*. The Books that are of authority in this part of *India* are three—*Menu*, *Mitacshara*, and *Mayucha*. Mr. *Colebrooke*, the celebrated author of the Digest, speaks of the *Mayucha* in a letter set out in *Strange's* 'Hindu Law,' p. 318 [2nd edit.]; the next in authority is the *Mitacshara*, which Mr. *Borradaile* mentions in his Reports, and he says there are three Books generally referred to in this part of

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this Court in 1859, after lengthened consideration of all the accessible authorities, and after consulting the country. I also had inquiries made of the *Shastrees* here and at *Poonah*, and they say these three Books establish the usage, and have been referred to for the last eighty years at least as authorities here on the law of inheritance. The *Daya-Bhaga* referred to in Sir *Thomas Strange's* work is of the *Bengal* school. I was led to make these inquiries because *Strange* refers to *Bengal* Books—the *Bengal* law being different. Then, according to these three Books, what estate does the widow take? All the authorities, both in *Bengal* and here, are in unison as to the right of the widow to succeed where the property is separate, and in the former to undivided also, but her power over it is said to be limited on the *Bengal* side, and she is merely treated as tenant for life. But on this side there appears to be a different practice, which appears to be founded on the authority of the Books I have mentioned. In *Strange*, 'Hindu Law,' p. 247, he says the restrictions on the widows' power is limited and concerns land only—but as to personal estate greater latitude is given. He cites the *Bengal* Reports, and *Borradaile's* Reports. I cannot get the *Bengal* Reports, but *Borradaile* does not bear him out. In *Sp. Summary*, published by the *Bengal* Government in 1825, it is stated, that the widow holds the moveable property absolutely; but of land is merely tenant for life. He there refers to the *Mitacshira*, which says, therefore, it is a settled rule that the widow takes the whole estate when separate, if living chaste. The *Mayucha* lays down the proposition very much in the same way, and says the widow takes the moveable and immoveable property. On the questions submitted to the *Shastrees*, it appears that the widow has power over the whole estate for proper purposes, and over the immoveable property she is limited to the use of it for life, but can mortgage or sell it for necessary purposes—but she is bound to exhaust the moveable before resorting to the immoveable property, the latter being an object of care to the Hindoo law, with a view to preserve it for the heirs. The cases are very conflicting, but I found over the moveable she has power, but that it is denied over the immoveable, and that a widow may give during her life personal property, but cannot will it (the learned Judge here referred to 2 *Morley's* Dig., p. 69). On the whole, I think the spirit and practice of the Hindoo law as existing in *Western India*, will be best construed by treating the widow as having uncontrolled power



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*Shastrees*, both in *Poonah* and in the *Sudder Adawlut* of *Bombay*, held that daughters, on this side of over the moveable estate, but not having more than a life use over the immoveable estate. The widow has by the text Books a number of duties thrown on her as to spending money, but they are of that character that it would be impossible for the Court to carry them out. In *Bengal*, dealings by a widow with the immoveable estate are legally but not morally good, but I am not aware that it has been so held here. I have, therefore, come to the conclusion, that in regard to immoveable property her estate is in the nature of that of a tenant for life. The widow, therefore, not having full power, we must see who are entitled. In this case there are daughters. Now, according to all the authorities, the daughters take next after the widow. But what is the nature of the estate they take? And here there are differences of opinion; but dealing with the question according to the three Books I have mentioned it appears to me that the daughters take an absolute estate. That the separate property they take by inheritance from the father ranks as *Stridhana*, is asserted by the *Mitacshara*; but this is denied by *Strange*. But the practice, so far as my search goes, does not agree with the *Mitacshara*; therefore, I think it is not expedient or consonant with practice to hold that property coming to daughters by inheritance is *Stridhana*, but merely the immoveable part of it. *Strange* says, 'Neither does such property go as *Stridhana*, but, according to southern authorities, it classes as *Stridhan*;' but going to the fountain of law, *Menu*, as quoted in the *Mayucha*, p. 103, s. 10, we have it laid down that, in default of sons, the daughters are treated as sons, and take absolutely. With reference to this point, also, I consulted the *Shastrees* both here and at *Poonah*, the question being, whether daughters could alienate any and what portion of the property derived from their father, who died separate? The answer was, that daughters obtaining property could alienate it at their will and pleasure; and in this the *Shastrees* of both places agree. On reviewing the authorities, and 3 *Colebrooke's* Dig. p. 465, where it was held that daughters have a right to alienate property inherited, I have come to the conclusion that daughters take the immoveable property absolutely, when it comes to them after the death of the mother; and that the Plaintiffs have no *locus standi* in the Court. Therefore, in this cause, the Bill must be dismissed."

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*India*, taking by inheritance, take an estate absolutely. This doctrine was mainly based on the authority of the *Mayusha*, ch. iv., sec. 8, para. 10, p. 103, and on that of the *Mitacshara*, ch. II., sec. 2, paras. 1 and 2, p. 341. The passage from the *Mayucha* is as follows:—'In default of the wife, the daughters succeed, even as *Menu* says. The son of a man is even as himself, and the daughter is equal to the son; how, then, can any other inherit his property but a daughter, who is as himself?' In the case of *Deucow-verbace*, each *Shastree* rested his opinion as to the inheritability of the daughters on this same passage of the *Mayucha*, referring to it as a work of high and generally received authority, not only in *Guzerat*, but in *Bombay* and the *Deccan*; that is to say, over the larger and more important portion of this Presidency. Of the general authority of the *Mitacshara* on this side of *India* there can be, and, in fact, never has been, any doubt; and on this point the *Mitacshara* is not less clear and explicit than the treatise already cited. The text of the *Mitacshara* already referred to is in ch. II., sec. 2, on the 'right of the daughters and daughters' son.' In par. 1 it is laid down—'on failure of her (*i.e.* the widow) the daughters inherit.' Par. 2 is as follows:—Thus *Catayayana* says, 'Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, let the daughter inherit, if unmarried.' Also *Vrihaspati*, 'The wife is pronounced successor to the wealth of her husband, and in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs. How, then, should any other person take her father's wealth?' In the face of authorities so clear and explicit as these are,

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and so generally regarded as binding on this side of *India*, it becomes immaterial to examine the case referred to in the argument as having been decided in *Bengal*, where a different school of doctrine prevails, as to some portions of the line of Hindoo inheritance. We will observe, that the above expression in *Catyayana*, 'let the daughters inherit, if unmarried,' is shown by the following sections in the *Mitacshara* not to be restrictive, but preferential only as between married and unmarried daughters. It thus appears, that upon no construction of *Bhugwantrao's* Will have the Plaintiffs, on the face of the Bill, shown that they are entitled, upon the decease of *Luxumeebae*, to take the whole of the estate of *Bhugwantrao* for an estate of inheritance, or any other estate. They have of course equally failed in showing that they are interested in the account as prayed: and the demurrer must be allowed with costs."

The present appeal was from this judgment.

Mr. *Rolt*, Q. C., and Mr. *G. Lake Russell*, for the Appellants.

The question raised is one of inheritance and succession by the Hindoo law. The Appellants are the sole ultimate heirs and legal personal representatives of *Bhugwantrao*, and of his son, *Gujanon*, according to the Hindoo law, and entitled, as we insist, upon *Gujanon's* death to a moiety of his estate, subject to the life interest of the Respondent, *Luxumeebae*, and upon her decease absolutely to the whole estate of *Bhugwantrao* and his son, in undivided shares. *Luxumeebae*, as a Hindoo widow, is, by the Hindoo law, at the most, entitled only to a life estate in the moveable and inmoveable estate of her husband, whether

she takes under the Will, or by inheritance. *Keerut Sing v. Koolahul Sing* (a), and cases cited in *Morley's Dig.*, Vol. I., p. 614, pars. 8, 15. If the Will purports to give her a larger estate than an estate for life, the devise is inoperative and void in law as against the Appellants; but whatever be the quantity or quality of the estate now vested in *Luxumeebaee*, and formerly belonging to her deceased husband, whether as tenant for life, or as joint tenant, she has no power of disposing of the same, or at least of the immoveable part thereof, by Will, or otherwise, and the same, on *Gujanon's* death, descended to the Appellants, subject to *Luxumeebaee's* life estate, and at her decease, will devolve, according to the Hindoo law, upon the Appellants as remainder-men for an estate of inheritance. This view holds good whether the family be considered as undivided, or separate, or whether the property be considered as ancestral, or property separately acquired. In any event, the Appellants, the male cousins, as the male representatives of *Bhugwantrao* and *Gujanon*, succeed as heirs in preference to daughters. *Stranger's "Hindu Law,"* Vol. I., pp. 144-6, [2nd Edit.,] *ib.* vol. II., pp. 243-248. *Milacshara*, ch II., sect. 4, par. 7, p. 348. *Morley's Dig.*, Vol. I., pp. 321-2 pars. 125-7, 180-3. *Deucooverbaee's* case, referred to in the judgment of the Court below (b), only decided that the widow had a life estate; and though it was there held that her daughters succeeded on her death, yet such holding is contrary to the authorities. Even in cases where females take by succession, or descent, from the parent or brother, they take life estates only, and not absolutely. Again, the daughters

(a) 2 Moore's Ind. App. Cases, 331. (b) *Ante*, p. 528.

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being married, and their marriage portions paid, excluded them from participation.

Sir *Hugh Cairns*, Q. C., and Mr. *Wickens*, for the Respondents, were not called on.

Their Lordships' judgment was pronounced by  
 The Lord Justice KNIGHT BRUCE.

The question raised by the demurrer, the subject of this appeal, is, whether the Plaintiffs in the suit, the Appellants, have by the statements in their Bill shown any interest in the estate of *Bhugwantrao*, the Testator in the cause, or any concern with it. If they have not, the demurrer was rightly allowed.

*Bhugwantrao* was a Hindoo, resident at *Bombay*. He died in the year 1851, having made his Will in the English language, in that year. He appointed his wife, one of the Respondents, now his widow, sole Executrix, and in addition to some directions, which need not be now particularly mentioned, he expressed himself thus:— "All the outstanding debts due to me must collect, and after paying legal debt due by me, and the expense of the funeral and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, &c., I give and bequeath to *Luxumabae*, my dearly beloved wife, and my little son, *Gujanon*, an infant." Then follows an expression which has with propriety been the subject of observation, namely, the expression, "the joys, &c., I have made for my wife and children, they belonging themselves respectively." Their Lordships, however, consider that the word "respectively" has no application to the gift of the residue, but refers

only to whatever may have been meant by "the joys, &c."

The Testator, as has been said, died in the same year, survived by his wife, the Executrix, one of the Respondents, and her three daughters by him, who are also Respondents, and by the infant son, *Gujanon*, who died in the year 1853, a child under four years of age.

Observations have been very properly made concerning the true construction of the words of the gift of the residue—whether as giving, or not giving, an absolute interest, and whether as giving, or not giving, an interest in the nature of what English lawyers call a joint tenancy in common. In the circumstances that happened, their Lordships do not think it necessary to give an opinion upon that point or those points of construction, for whether the gift was absolute or not absolute, whether in common, as we call it, or in joint tenancy, upon the Testator's death, the widow and his son took the whole between them, at least in possession, and upon the death of the son, an infant of tender years, the widow became in every possible view entitled to the whole, at least for her life. There is no possible claim to an interest in possession in the Appellants.

Their claim is thus founded. They contend that upon the death of *Gujanon* the absolute interest in the whole, or a moiety, subject to a life interest in the widow, devolved upon his heirs, and that those heirs were the Appellants, and not the three daughters of the Testator, the co-Respondents with the widow. They make out, they say, that proposition by the nature of their relationship, namely, that they were the sons of the brother of the Testator, and being so related in

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the male line they excluded by law, they say, the sisters of *Gujanon* from the heirship to him, a proposition which the Respondents deny.

Now, upon the question of the capacity of the sisters to be heirs to their brother, different views of the law appear to have been taken in different parts of *India*, and a general leaning in favour of excluding the sisters in such a case appears to prevail in *Bengal*, but appears not to prevail in the territories of *Bombay*. It is a point upon which, probably, it may be said, that a reasonable difference of opinion may be entertained; but the authorities most regarded in *Bombay*, whence this case comes, seem to be in favour of preferring the claim of the sisters to the claim of the male paternal relatives, the cousins. The Chief Justice in giving his judgment in the present case, quotes a Book with which we are not familiar here, but which seems to be well known in *Bombay*, and 'to be considered and treated as an authority there. He says (a), "Supposing, then, *Luxumbae* to take a life estate only in the descended inheritance, the reversion vests in the next heir of *Gujanon*, and, upon the best authorities recognized in this Presidency, that heir is his sisters, who are Defendants in this suit. This appears, from *Mayucha*, ch. iv., p. 19, where, after enumerating the mother (see pp. 14 and 15), the uterine brother and his sons (secs. 16 and 17), the paternal grandmother (sec. 18)—and no paternal grandmother of *Gujanon* is shown to be in existence on the face of this Bill—the Commentator, in section 19, proceeds thus:—'In default of her (the paternal grandmother) comes.

(a) *Aule*, p. 525.

the sister, under this text of *Menu*. To the nearest *Sapinda* (male or female) after him or her in the third degree, the inheritance next belongs; and thus of *Bruhuspitia*, where many claim the inheritance of a childless man, whether they may be paternal or maternal relations, or more distant kinsmen, he who is the nearest of them shall take the estate.' And the next rank is hers (the sister's), both from her being begotten under the brother's family name, and there being no further reservation with respect to the gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of kin she succeeds. Considering the high authority of the *Mayucha* on this side of *India*, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain Commentators on the *Mitacshara*, the sister comes next in order of inheritance after the brother. The passage in the *Mitacshara* is contained in the first paragraph of ch. II., sec. 4: 'On failure of the father, brethren share the estate.' *Nanda Pandita* and *Balam-Bhatta*, says Mr. *Colebrooke*, in his note to this passage, consider that as including 'brothers and sisters' in the same manner in which 'parents' have been explained 'mother and father,' and conformably with an express rule of grammar. They observe, that the brother inherits first, and in his default the sisters; this opinion, Mr. *Colebrooke* states, is controverted by *Camalacara* and the author of *Mayucha*. It certainly is so in sec. 16 of chapters iv. and viii. of the *Mayucha*, p. 105; but it should be observed, that in p. 15 of the same Commentary, the doctrine of the *Mitacshara*, now

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generally regarded as established as to the word 'parents' including both 'mother and father,' is controverted, and on precisely the same grammatical grounds."

Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in *Bengal* upon this subject, or upon the construction of the word 'brethréen,' is wrong; but certainly neither are they satisfied that the construction put by the passage in the *Mitacshara*, which has been mentioned, and generally adopted as it seems in *Bombay*, is wrong. Their Lordships come to the conclusion that the general rule in *Bombay* has long been, and is, to treat the sisters as heirs to the brother rather than the paternal relatives of the description of the present Plaintiffs. Accordingly their Lordships think that they may safely and properly, in the present instance, adopt or accept that rule. They consider that in *Bombay*, at least, the sisters in such a case as this, are the heirs of the brother. The consequence is, that in whatever possible manner the Will of the Testator is read, the entire interest in the property in question must, we think, be viewed as vested in the widow and her daughters, or some or one of them, and that, therefore, the Appellants here, the sons of the brother of the Testator, are suing in a matter in which they have not shown the slightest interest, nor with which they have any concern. The result is, in their Lordships' opinion, that the demurrer was rightly allowed, and that the appeal should be dismissed, with costs.

It ought to be added, as to the argument that the marriage of the daughters and their marriage por-

- tions excluded them from participation, that their
- Lordships\* think there is no ground for that argument either in principle or otherwise.

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AND

SRIMUT RAJAH MOOTTÖO VIJAYA  
 . . RAGANADHA BUDHA GUOROO } Respondent.\*  
 SAWMY PERIYA ODAYA TAVER }

*On appeal from the Sudder Dewanny Adawlut at  
 Madras.*

IN this case the appeal was brought from a decree of the Civil Court of *Madura*, dated the 27th of *December*, 1847, by which the Respondent's father, *Gowery Taver*, the son of *Oya Taver*, was held entitled to the *Zemindary* of *Shivagunga*, as heir to the Appellant's

27th, 28th,  
 29th, & 30th  
 April,  
 30th May, &  
 1st of June,  
 1863.

The *Zemindary* of *Shivagunga* in *Madras* is in the nature of a *Principality*, impartible, and capable of enjoyment by only one member of

\* Present : Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

*Assessors*,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

- the family at a time.

By the law of inheritance prevailing in *Madras* and throughout the southern parts of *India*, separate acquired estate descends to a widow, in default of male issue of the deceased husband.

The interest of a Hindoo widow so succeeding to her husband's estate is similar to that of a tenant in tail by the English law, as representing the inheritance.

In a united Hindoo family where there is ancestral property, and one of the members of the family acquires separate estate, on the death of that member such separate acquired estate does not fall into the common stock, but descends to the male issue, if any, of the acquirer, or in default, to his daughters, who, while they take their father's share in the ancestral property, subject to all the rights of co-parceners, inherit the self-acquired estate free from such rights.

Where property belonging in common to a united Hindoo family has

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father, *Gowery Vallabha Taver*, in preference to *Anga Moottoo Natchiar*, the surviving widow of the latter, on the ground that Appellant's father and his elder brother, *Oya Taver*, were undivided brothers. The appeal also embraced the decrees of the *Sudder Adawlut* Court at *Madras*, dated the 19th of *April*, 1852, the 5th of *November*, 1859, the 3rd of *March*, 1860, and the decree of the Civil Court of *Madura* of the 25th of *August*, 1859, in which it was held that the Appellant, claiming as heir in remainder after the death of the surviving widow, *Anga Mootloo Natchiar*, was not entitled either to appeal from the decree of the 27th of *December*, 1847, or to prosecute a new suit to recover the *Zemindary*.

The property claimed comprised the *Zemindary* of *Shivagunga*, a *Zemindary* of very great value, situate in the District of *Madura* in the Presidency of *Madras*, together with other property and mesne profits to a very large amount.

The circumstances of the case, the history of the *Zemindary* of *Shivagunga*, and of the extensive litigation respecting the succession, were as follow:—

The *Zemindary* of *Shivagunga* was created by

been divided, the share of a deceased member of the family goes in the general course of descent of separate acquired property; but if there is a co-partnership between the different members of the united family survivorship follows.

Upon the principle of survivorship, the right of the co-partners in the undivided estate overrides the widow's right of succession; but with respect to self-acquired property of a member of the united family, the other members of the family have neither community of interest, nor unity of possession, therefore, the foundation of the right to take by survivorship fails.

A decree in a suit by *A* against *B*, claiming as widow, to succeed to her husband's estate, in preference to *B*, his nephew, on the ground of the family being divided, held not to operate as *res judicata*, or capable of being pleaded in bar to a suit by *C*, a daughter, claiming to succeed to her father's estate on *A*'s death, on the ground that the property was self-acquired by her father. Such judgment, though viewed otherwise by the Court below, determines only an issue raised concerning a particular person, and is not a judgment *in rem*, but simply a judgment *inter partes*.

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*Saadut-Ally Khan*, Nabab of the *Carnatic*, in the year 1730, and it was given as an hereditary fief by him to *Shasavarna Odaya Taver*, of the family of *Nalvooty*, of the *Marawa* caste, in reward for his military services. *Shasavarna* was on his death succeeded by his only son, *Vadooganada*, who was killed in battle. *Vadooganada* had an infant daughter by his wife, *Ranee Velu*, but no other child. It appeared that two persons named *Vella Murdoo* and *Chinna Murdoo* then usurped the actual government of the *Zemindary*, and ultimately wrested from the Nabob of the *Carnatic* his acquiescence in the nominal tenure of the *Zemindarship* by *Ranee Velu*. *Velu* gave her daughter by *Vadooganada* in marriage to one *Vengam Odaya Taver*. The daughter died in giving birth to her first child, and the child survived its mother but a short period. Both died in the lifetime of the *Ranee Velu*, who was thus left issueless. It also appeared that the Appellant's father lived at *Shivagunga* with the *Ranee*, who, it was alleged, had adopted him. The parties who then appeared to be entitled to the *Zemindary* were two brothers, *Oya Taver* and *Gowery Vallabha Taver*, collateral descendants from the progenitors of *Shasavarna*. *Gowery Vallabha Taver* was at this time about twenty-nine years of age. *Oya Taver* was his senior in years, but sickly and infirm. The two brothers were the nearest relations of *Vadooganada*, and also of *Shasavarna*. *Vella Murdoo* and *Chinna Murdoo*, on the death of *Ranee Velu*, expelled *Oya Taver* and *Gowery Vallabha Taver* from the *Zemindary*, and joined a rebellion against the Government. This rebellion was put down by the East India Company.

By the Treaty of the 12th of July, 1792, all sovereign power over the *Poligar* countries, including the *Zemindary* of *Shivagunga*, was transferred in perpetuity by the then Nabob of the *Carnatic* to the East India Company.

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By a proclamation of Lord *Clive*, dated the 6th of *July*, 1801, the Government transferred the *Zemindary*, which, it appeared, was treated by the Government as an escheat for want of lineal heirs, to the Appellant's father, *Gowery Vallabha Taver*, otherwise called *Permettoor Worria Taver*, or *Woya Taver*, who was collaterally descended from the progenitors of the first *Zemindary*, and appointed him *Zemindar* of *Shivagunga*.

By a *Sunnud i Milkeat Istimrar*, or deed of permanent settlement, dated the 22nd of *April*, 1803, the *Zemindary* was confirmed to the Appellant's father, to hold in perpetuity, with power to transfer the same by sale or gift, on payment to the Government of a permanent annual *jumma*. From the time of his investiture in 1801, until his death in 1829, Appellant's father continued the sole *Zemindar*.

The principal questions involved in the appeal were, first, whether the Appellant's father and his brother, *Oya Taver*, were divided brothers; and, secondly, if the *Zemindary* was the self-acquired estate of the Appellant's father. It was alleged by the present Appellant that her father, and his elder brother, *Oya Taver*, had divided their ancestral and other property at *Padamattoor* and elsewhere, which they held as principal *Byots* under the former *Zemindar* of *Shivagunga*. This division it was said was effected by deeds executed in the year 1792, after which Appellant's father remained with *Ranee Velu* at *Shivagunga*, which was some distance from *Padamattoor*, where *Oya Taver* continued to reside, *Padamattoor* having fallen to his share on the division. It appeared that by a *Mocchilka*, or lease, dated the 17th of *July*, 1803, the elder brother, *Oya Taver*, leased from the Appellant's father eight villages, part of the *Zemindary*, in permanent lease, at a fixed *teerva* (rent) of

*Pons* 3,157. These villages were held under the *Moochilka* by *Oya Taver* until his death on the 17th of April, 1815, he having paid the *teerva* to his brother, with the exception of some arrears due at his death. By a *Moochilka*, dated the 24th of July, 1815, *Moottoo Vadooga Taver*, also called *Woya Taver*, the eldest son of *Oya Taver*, rented the same villages at the same rent in a similar manner from the *Zemindar*, at the same time binding himself to pay the arrears due from his father. In the year 1820, *Moottoo Vadooga* made claim to the eight villages as *Zemindur* of a separate *Paliaput*, at *Padamattoor* and treated some disturbance, refusing to pay the rent to his uncle, the Appellant's father.

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This gave rise to a suit being instituted on the 21st of March, 1823, by the Appellant's father against *Moottoo Vadooga* and his two brothers, *Gowery Vallabha* and *Bodha Goorbo Swamy Taver*, the three sons of *Oya Taver*, to recover the eight villages as forfeited for non-payment of *teerva*, founding his right upon the gift of the *Zemindary* to him by the Government in 1801, and the two *Moochilkas* in 1803 and 1815. *Moottoo Vadooga* and his two brothers filed their answer and thereby set up, by way of defence, first, that they were entitled to the whole *Zemindary* of *Shivagunga* as the elder branch of the family, and that the Proclamation of Lord *Clive* in 1801 was in favour of their father, and that it treated the Appellant's father as a mere manager for his elder brother; secondly, that the eight villages of *Padamattoor* formed a sub-*Paliaput* attached to *Shivagunga*, which had been enjoyed by *Oya Taver* and his ancestors as their own property; thirdly, that the *Moochilkas* were fabrications of the Appellant's father; and lastly, that the *Zemindary* was

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not the self acquisition of the Appellant's father, but had been enjoyed by him and his brother as undivided brothers. The Appellant's father, by his replication, denied that the eight villages formed a separate *Paliaput*, and rested his case upon his self-acquisition of the *Zemindary*, and upon the *Moochilhas*.

This suit was compromised by a *Razinamah*, dated the 5th of *January*, 1826, to the effect, that the Defendants had no right whatever to the *Shivagunga Zemindary*, or to the other estate thereto belonging, as stated in the answer; and it was agreed that the Defendants should enjoy the eight villages under the Appellant's father, paying to him a *kist* of 1,000 *pagodas* annually, and that the Defendants should also pay a part of the arrears of the *kist*, the rest being remitted by the Appellant's father.

Under this arrangement *Moottoo Vadooga* and his brothers held the eight villages, paying the *kist* to the Appellant's father, until his death, which event took place in the year 1829.

On the death of the Appellant's father, *Moottoo Vadooga* produced an alleged Will of the Appellant's father, dated the 17th of *June*, 1829, the day of his death, which purported to give him the *Zemindary*, in case the child of which the *Zemindar's* fifth wife was then *enceinte* should prove not to be a male.

The Appellant's father during his lifetime had seven wives. He died without leaving any male issue, but left three widows, one of whom, *Purvata Natchiar*, was *enceinte*. *Purvata Natchiar*, the sixth wife and second widow, was, after the death of her husband, delivered of a female child, thereupon the Government made over the *Zemindary* to *Moottoo Vadooga*. Claims were,

however, preferred to the *Zemindary* by the three surviving widows, *Anga Mooltoo Natchiar*, *Purvata Natchiar*, and *Moottoo Veray Natchiar*; and a claim was also set up by the son of *Cota Natchiar*, a daughter of the late *Zemindar*, as having been adopted by *Purvata Natchiar*. The claims of *Moottoo Vadooga* being supported by many of the family, the three widows were induced to give up their claims and that of the alleged adopted son of *Cota Natchiar*, and on the 29th of July, 1830, to execute a *Razinamah* admitting the right of *Moottoo Vadooga* as *Zemindar*, upon having certain lands made over to them for their maintenance. *Moottoo Vadooga* was then installed as *Zemindar* of *Shivagunga* by the Government, acting upon the *Razinamah* of the widows. On the 21st of June, 1831, *Moottoo Vadooga* died, and was succeeded, and possession of the *Zemindary* taken, by his son, *Badha Gooroo Sawmy Taver*.

On the 23rd of March, 1832, *Velli Natchiar*, a daughter of the Appellant's father, on behalf of her infant son, *Moottoo Vadooga Taver*, filed a plaint, No. 4, of 1832, in the Provincial Court of the Southern division of *Madras* against *Bodha Gooroo Sawmy Taver* to recover the *Zemindary*, on the ground that her son was the senior grandson of the first wife of the Appellant's father, and as such his heir, according, as alleged by her, to an answer of the Appellant's father to Government touching the succession, dated the 11th of April, 1822, by which grandsons through daughters were to be preferred to widows, and she insisted that the Appellant's father and his brother constituted a divided family, and that the alleged Will was a fabrication.

*Bodha Gooroo Sawmy Taver* by his answer to this suit insisted, that the Appellant's father had only acted as

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*Zemindar* by sufferance of his elder brother, *Oya Taver*; that the Appellant's father, by an order of 'succession' dated 22nd of *September*, 1806, had pointed out his nephews as his heirs in case of failure of sons; that the Will of Appellant's father was a valid Will; and that in case of partible estates, nephews were preferred to daughters' sons, and widows; and in his rejoinder to the Plaintiff's reply he urged in addition, that the self-acquisitions of an undivided brother descend, on his death without male issue, to his brothers and nephews in preference to widows and daughters and daughters' sons.

Points were recorded by the Court, but the point of division, or no division, was not included, and the opinion of Pundits of the *Sudder* Court was taken on the following case:—"A *Zemindary* was held by a certain person, after whom it was enjoyed by his son, his son's widow, and his son's daughter. The daughter having been married, produced a daughter, who died without issue. All of the above parties being dead, the Government published a proclamation, that the hereditary right of succession to the *Zemindary* was extinct, and that the *Zemindary* had escheated to the State. The Government therefore conferred the *Zemindary* on A., who was collaterally descended from the original *Zemindar*, and granted him the usual *Sunnud* of permanent property for it.

"A. married seven wives, of whom three were living at the time of his death. The first wife had a daughter, who bore three sons and a daughter. The second wife had a daughter who bore a daughter. The third wife had three daughters, the first of whom bore a son and two daughters, the second a

son, and the third was not married. The fourth, fifth, and seventh wives had no issue. The sixth wife had a daughter, who was not married.

"A. had an elder undivided brother, B., who died before A., but some years after the *Zemindary* had been granted to A., leaving three sons, the eldest of whom, C., on the death of A., took possession of the *Zemindary*, and continued to hold it until his death, after which he was succeeded by his son, D., who is now in possession of the *Zemindary*.

"Question first.—The *Zemindary* having escheated to the Government, and having by them been granted anew to A., and being therefore in the light of self-acquired property, to whom ought it, after his death, under the principles of Hindoo law, to have descended—to the widows of A. and their descendants, or to C., the son of the elder brother, B.?"

"Question second.—Supposing the line of descent to be in the widows and their descendants, who should be considered the heir—the eldest surviving widow, or the eldest son of the daughter of the first widow deceased?"

"Question third.—Would it have been consonant with Hindoo law for A. to have adopted one of his grandsons (daughter's son) as his son?"

"Question fourth.—Supposing A. to have left a will in favour of his elder brother's son, C., constituting him heir to the *Zemindary* and to the rest of his property, to the exclusion of his wives, daughters, and grandchildren, would such Will be valid under the principles of Hindoo law?"

To this case the Pundits on the 28th of October, 1833, returned the following answers:—"To the first Query.—The *Zemindary* granted by Government

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to *A.* should descend, after his death, to the son of his eldest undivided brother.

"To the second Query.—As the *Zemindary* should so descend, the widows of *A.* and their offspring, are not entitled to it.

"To the third Query.—*A.* should have adopted one of his daughter's sons, '*Dowhittras*,' and it would have been agreeable to the Hindoo law.

"To the fourth Query.—If *A.* had left a Will entitling his nephew, *C.*, to the *Zemindary* and other property, to the prejudice of his widows, his daughters, and to his grandsons, such a Will will be consonant to the Hindoo law; but the nephew is, however, bound to allow maintenance to the widows of *A.* Such are the texts propounded in *Vignyaneswara*, *Smriti Chandrika*, and so forth."

Witnesses were examined to prove the alleged fact of the division between the Appellant's father and his brother, *Oyr Taver*; the self-acquisition, the forging of the Will, and the opinion of the Appellant's father on the order of succession in 1822, whereupon the Provincial Court, acting on the opinion of the Pundits, passed a decree in favour of the Defendant.

*Anga Moottoo Natchiar* then asserted her claim, as eldest widow of the late *Gowery Vallabha Taver*, as heir to the *Zemindary*, and in the year 1833, filed a plaint *in formâ pauperis*, No. 3 of 1833, in the Provincial Court of the Southern division of *Madras* against *Bodha Gooroo Sawmy Taver*, claiming the *Zemindary* as heir to her husband, and stating that the last *Ranee* had adopted her husband, to whom the Government confirmed the *Zemindary* by *surruud*; that the Defendant had taken forcible possession of her husband's property and deeds; that he had forged a Will; and

that advantage had been taken of her to execute the *Razinamah* in ignorance of her rights, as being a Hindu widow she was not allowed to appear in public.

The Defendant by his answer denied the alleged adoption, and stated that the management of the *Zemindary* was conceded by *Oya Taver*, the rightful heir, to his younger brother; he denied also that the Will was a forgery, and set up the order of succession in the *arzee* of 1806, and relied also on the *Razinamah* executed in July, 1830, by the widows.

The issue of division or non-division, of the brothers, was not raised in this suit.

The Provincial Court, by a decree made on the 5th of September, 1834, in this suit, decided in favour of Defendant, on grounds that no adoption of Appellant's father by the *Ranee* had been proved; that this claim to the *Zemindary* was from the free choice of the Government; and assuming that the brothers were undivided, that the self-acquired estate of an undivided brother, dying without male issue, descended to his nephew in preference to his widow.

The Provincial Court also, by a decree dated the 5th of December, 1834, decided against the Plaintiff in the suit, No. 4, of 1832.

The Plaintiffs in the two suits of 1832 and 1833 appealed to the *Sudder Dewanny* Court at *Madras*.

Upon the appeals coming on for hearing, the *Sudder* Court submitted to the Pundits attached to that Court the following questions:—First, is the succession to the separate self-acquired property of a member of an undivided family governed by the same rules as the succession to the joint property of such family? Second, the self-acquired property of an individual

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not being liable to division, according to the Hindoo law, how can it be maintained that such property can be inherited by the brother in preference to the widow of the possession?

The answer of the Pundits, dated the 16th of *January*, 1837, to the first question was, "By saying that the separate self-acquired property of a member of an undivided family is not liable to division, is meant nothing more particular than that, at the time of partition of the common things, the acquirer of the said property, or his son, son's son, or grandson, need not give a share to the cousins out of the said property. Consequently, the succession to the separate self-acquired property of a member of an undivided family who died leaving no son, son's son, or son's grandson, is governed by the same rules as the succession to the joint property of such family." And to the second question, "The *Dharma Sastras* declare, as sanctioned by the established usage, that among the undivided brothers if one die without male issue the rest of his undivided brothers, &c., shall take the whole of his wealth and support his widows; but they do not declare, nor is it customary, that the separate self-acquired property of an undivided brother dying without male offspring should be given away to his widows. As it is, therefore, settled that the widow of an undivided brother who died leaving no son is entitled only to receive a maintenance, but not to succeed to any kind of property, to which her husband had possessed a right, it cannot be properly maintained that such self-acquired property can be inherited by the undivided brother of the possessor in preference to his widow." Authorities: "The text of *Vrihaspaty* and its commentary, clearly show

that the widow shall take the whole estate of a man who, being separated from his co-heirs, dies leaving no male issue, and that the whole property of her husband who lived in a united family and died leaving no male offspring shall devolve on his father, brothers, &c., who were not separated from him. The text of *Narada* propounds that, among the undivided brothers if one die without male offspring or enter a religious order, the rest of the brethren shall divide his wealth, except the wife's separate property. Consequently, the texts of *Vrihaspaty* and *Narada*, and the commentaries thereof, and the text of *Yajñawalkya*, declaratory of the right of the widow, daughters, &c., and the commentary thereof (contained in the law Book *Mitacshara*), furnish an authority to maintain that the self-acquired property of an undivided brother can devolve on his undivided brothers after his death."

On the 17th of April, 1837, the *Sudder* Court pronounced a decree in the two appeals, dismissing the appeal on behalf of *Moottoo Vadooga Taver*, and deciding in favour of *Anga Moottoo Natchiar's* appeal, on the grounds, that no adoption had been made by the Appellant's father; that a widow was preferred to a daughter's son; that the Appellant's father and his brother were divided; that the self-acquired property of a divided brother descended to his widow in preference to his brother's son; that the Will was a forgery; and, lastly, that the *Razinamah* of 1830, was not binding on *Anga Moottoo Natchiar*.

The decree of the *Sudder* Court being founded on the assumption that the two brothers were divided, *Badha Gooroo Sawmy Taver* applied for a review of judgment, on the ground, that the Appellant's father had, in three suits, in the year 1804,

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pleaded that he and his brother *Oya Taver* were undivided, but the *Sudder* Court refused such review. *Bodha Gooroo Sawmy Taver* then appealed to Her Majesty in Council from the decree of the *Sudder* Court, and having died pending the appeal, the appeal was, on the 15th of *January*, 1842, revived by *Gowery Taver*, his brother, the Respondent's father. On this appeal a decree was made by the Judicial Committee, and confirmed by an Order in Council, dated the 18th of *June*, 1844, by which the decree of the *Sudder* Court of the 17th of *April*, 1837, was reversed, on the ground that no points had been recorded in the Court below, as required by *Mad. Reg. XV.*, of 1816, on the question of division or no division of the family; but leave was given to the widow to bring a new suit within three years, their Lordships stating that the question of division was a most substantial question, and, without making any order on the subject, intimated that the question of division or no division appeared to be the only point on which the title would ultimately depend (a).

On the 2nd of *September*, 1844, *Gowery Taver* was put into possession of the *Zemindary* by Order of the *Sudder* Court.

In consequence of the leave given in the above appeal by the Judicial Committee of the Privy Council, *Anga Moottoo Natchiar* filed a plaint *in formâ pauperis*, No. 2, of 1845, in the Civil Court of *Madura*, against *Gowery Taver* and his younger brother, *Namasivaya Taver*, to recover the *Zemindary*. The plaint set forth the facts hereinbefore detailed, and the Plaintiff claimed to be heir of her deceased husband, shaping her case in

(a) See case reported, 3 Moore's Ind. App. Cases, p. 278.

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a twofold manner ; first, on the assumption that it was incumbent on her to prove that her husband and his brother, *Oya Taver*, were divided ; that the divided character of the family was established by the division and deeds which it was alleged had been taken possession of with the other documents by *Moottoo Vadooga*, on the death of her husband by the adoption of her husband by the *Ranee*, and his separate residence with the *Ranee* for many years ; by the self-acquisition of the *Zemindary* from the Government, and the homage paid to him by his elder brother ; by the *Moochilkas* and leases of *Padamattoor* and the eight villages by her husband to *Oya Taver* and his sons ; by the separate residence of the latter at *Padamattoor*, a long distance from *Shivagunga* ; and by the *Razinamah* in 1826 of *Bodha Gooroo Sawmy Taver*, admitting that the *Zemindary* was the self-acquired and separate estate of her husband, and that his elder brother had no right to it. Secondly, she alleged that the question of division or no division, was really immaterial, on the ground that, according to the Hindoo law, undivided brothers had no right to share in the self-acquired and separate estate of their brother, either in his lifetime or by descent, and she set out in detail the alleged forgeries of *Bodha Gooroo Sawmy Taver* to prove the undivided character of the family, and claimed the *Zemindary* and the mesne profits thereof, with other personal property.

*Gowery Taver*, the first Defendant, by his answer, set up the answer of the Appellant's father of 1806 as to succession ; the alleged Will ; the *Razinamah* of the widows, and the Pundits' opinion in the *Sudder Court* in 1837 ; he contended, moreover, that the Plaintiff ought, in the suit, to have confined



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herself to the question of division or no division; that the acquisition of Appellant's father was by right of cousinship and by consent of the elder brother, and he denied the adoption and division, contending that the division ought to have been set up by Plaintiff in her former suit, and in the appeal before the *Sudder* Court, and he further denied the Hindoo law set up by Plaintiff, as to the descent of self-acquisitions of an undivided brother; he also denied that the forgeries were the work of his brother.

Witnesses were called by the Plaintiff to prove the deeds of division and the actual division between Appellant's father and his brother in 1792, of the *Padamattoor* lands, and all their property, consisting of *Nunja* and *Punja* lands, *Ulava* and *Kavil* lands, cows, sheep, some ornaments, coins, and debts; that the house at *Padamattoor* was taken by the elder brother, and the house at *Seruvayal* by the Appellant's father; that the brothers always lived separate, the Appellant's father living with *Ranee Velu*, at *Shivagunga*.

On the other hand, the Defendants called witnesses to prove the brothers were undivided; that the brothers enjoyed the house and *Padamattoor* lands in common till the year 1794 (most of the witnesses spoke to this period, which was only two years' difference from the Plaintiff's witnesses; that they performed religious ceremonies jointly, as well before, as after the year 1794. Some of the witnesses deposed that the *Padamattoor* lands were enjoyed in common, though when pressed they admitted that *kist* was paid for the eight villages by *Oya Taver* to his brother, *Gowery Vallabha Taver*, as the *Zemindar*. The witnesses accounted for the separate residence of *Oya Taver* at *Padamattoor*, by reason that the water

of *Shivagunga* did not agree with him, and on an alleged admission by the Appellant's father, whilst the suit of 1823 was pending, that he did not then set up a division.

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On the 27th of *December*, 1847, the Civil Judge, Mr. *Baynes*, passed his decree, which was, in substance, to this effect, that the only point was the division of the brothers in the year 1792; and he was of opinion that the oral evidence on either side was equally worthless, but, if anything that the Defendant's witnesses were least credible; that the *Moöchilkas* proved no division; that the *Razinamah*, in suit, No. 4, of 1823, though by it the Defendant's father renounced "the right to compel Appellant's father to divide the *Zemindary* in his lifetime," did not prejudice his right as undivided heir; that the opinion of the Appellant's father, on the succession in 1806 and 1822 was more consistent with the fact of no division having taken place. That the depositions in the suit, No. 4 of 1832, on the point of division, though bearing the probability of truth on them as having been given on an incidental point, were not to be implicitly relied on, and, therefore, they were rejected by the Court altogether.; that the *Razinamah* of the widows in 1830 was binding on them, though given when they were ignorant of their rights; that the forgery of the Will by the Defendant's father ought not to be pushed against him as betraying any consciousness of a want of title; and the decree concluded by deciding that the brothers were undivided, and dismissed the suit with costs. At the same time the Court held that the Plaintiff as widow was entitled to an adequate maintenance.

This was the first of the appeals now brought before the Judicial Committee of the Privy Council.

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From this decree *Anga Moottoo Natchiar* appealed, *in forma pauperis*, to the *Sudder Dewanny Court* at *Madras*: the Appeal being entitled, No. 7, of 1849.

Pending the appeal *Gowery Taver* died, and left the Respondent, his eldest son and heir, then an infant, who revived the appeal.

The appeal, No. 7, of 1849, having been heard, the *Sudder Court* reserved its judgment; but, in the meantime, on the 23rd of *June*, 1850, *Anga Moottoo Natchiar* died childless, and the appeal was held by the *Sudder Court* to have abated; and the Court issued a notice to the heirs of *Anga Moottoo Natchiar* to come forward within six weeks and continue the suit.

The sixth and seventh widows having pre-deceased *Anga Moottoo Natchiar*, several claimants presented themselves as heirs in remainder to the *Zemindary*, as being the separate estate of Appellant's father, but these claimants were afterwards reduced to two. First, the Appellant as the younger daughter of the *Zemindar* by his third wife, who had died in his lifetime, the Appellant then having a husband and sons, and joining with her two sisters, *Bootakha Natchiar* and *Kota Natchiar*, both of whom were since deceased. Secondly, *Sowmea Natchiar*, a daughter of the *Zemindar* by his sixth wife, the second widow.

On the 24th of *August*, 1850, the Appellant and her two sisters filed their petition in the *Sudder Court*, claiming to carry on the appeal, as heirs in remainder to the Appellant's father, in succession to *Anga Moottoo Natchiar* deceased, as agreeing between themselves for the enjoyment successively, by *Bootakha Natchiar* and *Kota Natchiar*, for their successive lives, with ultimate remainder of the Appellant; and *Sowmea Natchiar* filed her petition, claiming to

carry on the appeal as heirs, niece and devisee of  
*Anga Moottoo Natchiar.*

*Vadooga Taver*, on the 26th of *September*, 1850, the Plaintiff in the original suit of the 23rd of *March*, 1832, No. 4 of that year, filed a petition claiming as heir also, as being descended from the senior wife of the Appellant's father, but his claim was not prosecuted.

On the 26th of *September* and the 17th of *October*, 1850, the Respondent by his guardian filed counter petitions praying the Court to refuse the Appellant, and the other alleged heirs in remainder, leave to carry on such appeal, and also praying the Court to refer them to the institution of a new suit, on the ground, that in such new suit he might be able to set forth particular objections to their claims from their individual acts, such as accepting maintenance from his father and other members of his family.

An Order was passed by the *Sudder Court*, on the 21st of *October*, 1850, declaring that none of the claimants could be accepted as the heir of the deceased Appellant, as she was a childless widow, but that they might simply plead a right of succession on her death as the daughters of the *Zemindar*, and that, although the decision of the appeal might materially affect such right of succession, still that would not vest in them the right to continue it, but the Court, at the same time, observed that their order would form no bar to the institution by any of the claimants of a new action for the recognition of their alleged claims, if instituted on or before the 30th of *April*, 1851, and that at the expiration of that period the decree of the Civil Court would be considered final.

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On the 25th of *November*, 1850, the Appellant and her sisters filed their petition for a review of the Order of the 21st of *October*, 1850, stating, that *Anga Moottoo Natchiar*, as widow, had a life interest only in the *Zemindary*, and that it was only at her death that a title accrued to them as the heirs in remainder, and that during her lifetime they could not have instituted a suit, and they claimed to be entitled to a term of twelve years from the death of *Anga Moottoo Natchiar* to prosecute their claim.

Upon the presentation of these petitions the *Sudder* Court, on the 7th of *March*, 1851, submitted the following question to the Pundits of that Court, for their opinion as to what person should supply the place of *Anga Moottoo Natchiar* in the appeal:—"A *Zemindar*, *A.*, who had married seven wives during his lifetime, died, leaving behind him his fifth wife, *B.*; his second wife's daughter, *C.*; his third wife's daughters, *D.* and *E.*; his sixth wife's daughter, *F.*; and his wife's grandson, *G.*, by her daughter. *B.* instituted a suit claiming the succession to the *Zemindary*, on the ground that a family division had taken place before the death of *A.* Supposing the suit of *B.* grounded on family division to be just, you will explain who of the above mentioned individuals are entitled, under the Hindoo law, to supply the place of *B.*, and carry on the suit?"

The Pundits gave to this question the following answer:—"Neither of the parties marked *C.*, &c., in the question, as being the offspring of *B.*'s husband by his other wives, is legally entitled to conduct the appeal referred to; neither the daughters of rival wives, nor their sons, being authorized by the Hindoo law Books, *Vijnyaneswara*, &c., prevailing in this

part of the country to perform funeral rights or inherit property. In prescribing the order of succession the law Book, entitled '*Vijnyaneswara*,' draws no distinction between a woman's peculiar property called '*Stridhana*' and that which devolved upon her by inheritance; it on the contrary treats them jointly in propounding heirs to succeed to the property of a childless woman: further, the said law Book makes no mention of the daughter, or of the son of the daughter of a rival wife equal in class, although it speaks of the daughter of a rival wife being superior by class. The said authority likewise, in propounding the distribution of the property of a childless woman, declares that the property of a childless woman, who had been married in any of the forms denominated '*Brahma*,' &c., shall (after her demise) devolve upon her husband, and on failure of him upon his nearest kinsmen *sapindas*; but who these *sapindas* are the work does not describe (in the particular place where the said succession is mentioned); it, however, in treating upon the succession to the property of a sonless man, adverts to the text which says, 'The relation of the *sapindas*, or kindred connected by the funeral oblation, ceases with the seventh person.' From this is to be gathered that all the kindred sprung from the same family, or from the same primitive stock, and reaching the seventh degree in direct descending line, are '*sapinda*,' kinsmen of each other; such *sapindaship* cannot by any possibility exist in step-daughters or their sons mentioned in the question. It is further observable, that the right of succession to the property of a deceased person is generally dependent upon the successor's competency to confer benefits

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on the deceased by the performance, as it is stated by the Hindoo lawgivers, of the deceased's funeral rites, but in the compact series of heirs competent to perform such exequial rights step-daughters and their sons are nowhere mentioned. It is for these reasons that we have stated in our answer of the 13th instant, 'that the daughters of a rival wife or their sons, are no heirs.' 18th of *March*, 1851. The head Translator of the Court having in returning this paper conveyed to us the Registrar's requisition that we should set forth the particulars of *sapindas*, and specify whether or not a maiden daughter is a *sapinda*, and as such entitled to succeed to property, we beg to submit the required particulars as follows:—1. The law Books '*Vijnaneswarq*,' &c., declare that of a woman dying without issue, and who had become a wife by any of the four modes of marriage denominated '*Brahma*,' '*Daiva*,' '*Arisha*,' and '*Prajapatya*,' the whole property belongs in the first place to her husband, and on failure of him to his nearest kinsmen '*sapindas*,' who are his mother, father, uterine brother, step-brother, uterine brother's son, step-brother's son, paternal grandmother, paternal grandfather, sons of ditto, grandsons of ditto, paternal great-grandfather, sons of ditto, and their issue, those persons being in the chapter "on succession to the estate of a sonless man," declared to be the nearest '*sapinda*' kinsmen of the man destitute of male issue. 2. In the Book called, '*Varadarajeyum*,' chapter 'on succession to the estate of a sonless man,' section 'on daughter's succession,' the author declares a maiden daughter to be '*sapinda*' of her father to enable her to inherit his property in preference to his married daughter;

but in the chapter 'on succession to the property of a childless woman,' the said author does not declare a daughter entitled to inherit the property of her step-mother. The *sapindaship* of an unmarried daughter is but temporary, inasmuch as it ceases with her marriage. It only tends to invest her with inheritance in preference to married daughters who are not '*sapindas*,' but it cannot give her any right to succeed to the property of her step-mother, who leaves no issue behind her. Impressed with this opinion, we have stated that daughters of rival wives are in general not entitled to inherit the property of their step-mothers."

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On the 28th of *April*, 1851, the *Sudder* Court put to the Pundits this further question—"Your attention is requested to the annexed genealogical trees, and you will be pleased to state whether anything thereon leads you to modify the opinions expressed by you on the 18th and 20th of *March*, 1851, and to that question the Pundits made the following reply:—We have perused the four genealogical trees annexed to the foregoing question, and observe that all the parties therein referred to are *B.*'s step-daughters, and their sons and daughters, who by the Hindoo law Books, '*Vijnyaneswara*,' &c., which prevail in this part of *India*, are not entitled either to perform funeral rites or to inherit property. We, therefore, see nothing to induce us to modify the opinion already expressed by us that the said parties have no right at all."

On the 1st of *May*, 1851, the *Sudder* Court revoked their Order of the 21st of *October*, 1850, and directed the appeal to be replaced upon the file and the present Appellant and the other



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claimants to be made supplemental Appellants, and the Court resolved at once to hear the appeal, and that if it should be sustained, the Court 'would then' determine (in order that the rights of Appellant and the other supplemental Appellants as against each other and as against the Respondent might be tried) whether the record should be remanded to the Court of original jurisdiction, or whether any other more appropriate course could be pursued in regard to the same.

Accordingly the Appellant and the other heirs in remainder prosecuted the appeal suit, No. 7 of 1849, as supplemental Appellants, and several proceedings were had therein.

On the 22nd of March, 1852, the *Sudder* Court put the following question to its Pundits in reference to the appeal suit, No. 7 of 1849 :—"A *Zemindar*, *A.*, married during his life seven wives, and died, leaving behind him *B.*, his fifth wife ; *C.*, his daughter by his second wife ; *D.* and *E.*, his daughters by his third wife ; and *F.*, his daughter by his first wife ; and *G.*, the son of his daughter by his first wife. The fifth wife also died subsequently. Supposing the family to be divided, can the above-mentioned individuals be admitted to be the heir, or heirs, of the deceased *Zemindar A.* ? If such admission is made, who are his heirs ? You will explain this subject."

On the same day the Pundits returned the following answer :—"According to the passage in the section on the right of inheritance to the estate of a man dying without male issue, *B.*, the fifth wife of *A.*, succeeded to the whole of his estate on his death. Neither the daughters of *A.*, nor the descendants of such daughters, have a right to the said estate during

the lifetime of the said *B.* Therefore, the estate having devolved on *B.* by the death of her husband, her daughters and others must be her heirs. Neither the daughters of *A.*, nor the descendants of such daughters who belong to a line different from that of *B.*, can be recognized as heirs to the said estate."

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The *Sudder* Court afterwards put the following further question to the Pundits, in reference to the suit, No. 7 of 1849 :—" *A.*, a *Zemindar* who had married seven wives during his lifetime, died, leaving behind him *B.*, *C.*, and *D.*, the fifth, sixth, and seventh wives ; *E.*, his daughter by the sixth wife, *C.* ; *F.*, his daughter by the first wife ; *I.*, *J.*, and *K.*, daughters by the third wife, and nine individuals his grandsons, by his daughters by the first and second wives who died before him. Subsequently *C.* and *D.*, died, and *B.*, the fifth wife, a few years after them. Supposing the family of *A.* to be divided, can any of the above-mentioned individuals be admitted as heir or heirs, to the *Zemindary*, and if such admission is made, who shall be considered as heirs? You will explain this."

The Pundits gave to that question the following answer :—" Although the fifth, sixth, and seventh wives, who survived the *Zemindar*, *A.*, possessed the power of wives, yet the Hindoo law, entitled *Smriti Chindrika*, confers the right of the *Zemindary* upon the sixth wife, because she has a daughter. The daughter of the sixth wife is, therefore, entitled to the *Zemindary* after her mother's death."

When the supplemental appeal came on to be heard, the *Sudder* Court, by an Order dated the 19th of *April*, 1852, reversed their Order of the 1st of *May*, 1851, on the ground that, as the Appellant and the other parties

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claiming as heirs did not claim as representatives to the late Appellant, the widow, but on their own distinct rights as descendants of Appellant's father, they could not be substituted for her, and carry on her appeal, but the Court informed the Appellant and the other parties claiming as heirs in remainder, that they could pursue their rights in the *Zillah* Court in the first instance, and the Court struck the appeal suit, No. 7 of 1849, off the file, as having abated on the death of the Appellant, *Anga Moottoo Natchiar*.

This was the first decretal Order now appealed from.

The Respondent, by his guardian, being dissatisfied with this Order, filed a petition in the *Sudder* Court, insisting that though upon the abatement of the appeal suit by the death of the widow, the next heir after her claiming under the same title might be entitled to revive such appeal, yet she could not institute a new suit in the *Zillah* Court, after a judgment by such Court in the suit by the widow claiming as previous heir, and submitted, that it was competent for the *Sudder* Court to admit the party next in descent, claiming under the same title, as a supplemental Appellant, and in his petition he entered at great length into the hardship of being obliged again to litigate the question of division or no division of the family, and finally prayed for a review of the Order of the 19th of April, 1852.

By an Order of the 16th of September, 1852, the *Sudder* Court adhered to their previous Order of the 19th of April, 1852.

The Appellant then, in the first instance, applied to the Civil Court of *Madura* for leave to sue *in forma pauperis*, and that Court, by an Order of the 16th of June, 1854, referred certain questions upon points of

Hindoo law raised in the case to the law officers of the Court, and after receiving the *Futwah* of the Pundts, rejected the Appellant's application, by an Order of the 6th of *November*, 1854; and after several other Orders made by the Civil Judge, and appeals to the *Sudder Court*, the latter Court ultimately by a further Order, dated the 10th of *March*, 1856, declared that the Order of the Civil Judge disposed simply of Appellant's application to sue *in forma pauperis*, and that it was no bar, to her prosecuting her claim in the usual form.

Accordingly, on the 5th of *December*, 1856, the Appellant filed her complaint in a suit, No. 10 of 1856, in the Civil Court of *Madura*, against the guardian of Respondent, then a minor, and the Collector of *Madura*, as agent of the Court of Wards, for the recovery of the *Zemindary* and also of the profits thereof for six years; claiming the *Zemindary*, as having been the divided and self-acquired estate of her father; contending that, even if the brothers were undivided, the self-acquired property of an undivided brother descended to his widows and daughters in preference to his nephews; and that she was entitled as the next heiress in remainder of the *Zemindary*, after the death of *Anga Moottoo Natchiar*.

The guardian of the Respondent (the minor *Zemindar*) by his answer objected to the competency of the suit, as the cause of action had arisen upwards for twelve years previous to the institution thereof, and was barred, under cl. 4, sec. 18, *Mud. Reg.* II. of 1802, as the Appellant's father had died in *June*, 1829; and he set up the Orders of the *Sudder Court* of the 21st of *October*, 1850, the 1st of *May*, 1851, the 19th of *April* and 16th of *September*, 1852, as a bar to the

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suit. The answer also denied the Appellant's title as next heiress, and challenged the fact that the *Zemindary* had been the divided estate of Appellant's father, entering at great length into the merits to prove that the estate was undivided.

The other Defendant, the Collector of *Madura*, by his answer disclaimed any right in the *Zemindary*.

*Sowmea Natchiar* claiming to be the sole heiress of *Gowery Vallabha Taver*, as his only daughter by his sixth wife, then commenced a suit, No. 4 of 1857, against the Respondent to recover the *Zemindary*. The Respondent, among other things, pleaded the decree of the 27th of *December*, 1847, in bar to that suit.

No evidence was allowed to be entered into by the Appellant in the suit, No. 10 of 1856, nor were any points recorded therein.

On the 25th of *August*, 1859, the Judge of the Civil Court, Mr. *R. Cotton*, dismissed the suit of the Appellant, and of her sister, *Sowmea Natchiar*, in the suit No. 4 of 1857. The material part of the decree made in both suits was as follows:—"The Plaintiffs in both the suits sue the guardian of the present minor *Zemindar*, and the Collector of *Madura*, as the agent for the Court of Wards, for the recovery of the *Shivagunga Zemindary*, each averring herself to be the sole heiress of the deceased *Zemindar*, *Gowery Vallabha Taver*, who died in 1829. The Plaintiff in the original suit, No. 10 of 1856, as his only surviving daughter having male issue; the Plaintiff in the original suit, No. 4 of 1857, as the only daughter of the widow (sixth) who survived her husband—both assert their father was divided from his brother, *Oya Taver*. The Plaintiff in the suit, No. 10 of 1856, states, that she sues

for the estate solely as the only surviving daughter of her father the late *Zemindar*; having male issue, not as heir or successor to *Anja Moottoo Natchiar*; that her suit is based on the pleaded division between her father and his brother, and that if they were undivided she has no claim to the ancestral property but still claimed the *Zemindary*, as the self-acquired property of her father, under the law contained in pages 33, 152, 153, and 155 of *Macnaghten's* "Hindu Law," Vol. II. If the brothers were divided, she asserts that the law, as propounded by the *Madras* Pundits in appeal, No. 20 of 1838, and by the *Bengal* Pundits in their *Futwah* of the 23rd of February, 1837, and enumerated in a paper put in, establishes her right. The Plaintiff in the original suit, No. 4 of 1857, states, that she sues as the daughter of the *Zemindar's* surviving widow—the other two widows (fifth and seventh) who survived the *Zemindar* having died childless; she avers, however, that had they been living now they would have no right to the estate; thus admitting that her right to the estate commenced on the death of her mother in 1832, when she was in her sixth year, and that her present plaint was presented only on the 24th of June, 1856, or twenty-three and a half years after the death of her mother; that if her father and his brothers were divided, as she pleads, her right is clear by the *Futwahs* of the *Madras* and *Bengal* Pundits; if undivided, by that of the latter only. The Court proceeds to determine—first, whether it is competent to allow the plea of division to be advanced. The facts of the case are briefly as follows:—*Anja Moottoo Natchiar*, the mother of the Plaintiff in the original suit, No. 4 of 1857, instituted a suit, No. 3 of 1833, before the Southern Provincial Court; her suit

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was dismissed; the Judges considering that as the late *Zemindar* and his brother were undivided, the Pundits' *Futwabs* clearly showed she had no right to succeed her husband. In appeal, the Judges of the *Sudder* Court were opinion, that the evidence adduced was sufficient to show that a division had taken place; and the law officers of their Court having, under these circumstances, declared the widow was the heir of her husband, they reversed the lower Court's decision, awarding the estate to *Anga Moottoo Natchiar*. On appeal to Her Majesty in Council, it was discovered that the very material question of division or non-division, on which the case hinged, had never been made a point, nor had evidence been cited to prove it; the Judicial Committee, therefore, dismissed the appeal, but, for certain reasons given, they declared that the Plaintiff, *Anga Moottoo Natchiar*, might bring a fresh action for the estate, if she did so within three years. She accordingly instituted the original suit, No. 2 of 1845, when the point of division or non-division, to which the Judicial Committee of the Privy Council had restricted further investigation, was tried, and the late Judge, Mr. *Byrnes*, on a full and careful consideration of all the evidence, oral and documentary, decreed that division had not been proved: on the contrary, he conceived that the Defendant had, as clearly as the circumstances would admit of, shown that the brothers were undivided, and he, therefore, dismissed the suit, as might have been expected. The Plaintiff appealed (No. 7 of 1849), but before the case was determined, she died; on which several parties petitioned to be allowed to carry on the appeal. Their petitions were first rejected, but the Court, apparently considering that justice required

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that the lower Court's award should not become immediately final, gave permission to the Petitioners (the Plaintiffs) to bring regular actions for recovery of the estate, provided they did so before the 30th of *April*, 1851. Instead of taking advantage of the Court's period of grace allowed them, the Plaintiffs petitioned the Court for review of their proceedings, the result of which was, that the Court overruled their former proceedings, and adjudged that the Plaintiff's petitions could be admitted to carry on the appeal, No. 7 of 1849. Subsequently, on a petition from the Defendant, the *Sudder* Court again took up the case, and finally revoked their proceeding of the 1st of *May*, confirming the principle laid down in those of the 21st of *October*, 1850, namely, that the Plaintiffs could not be allowed to carry on the appeal, which, having abated on the death of the Appellant, the *Sudder* Court struck off their file, referring the Plaintiffs to the regular Court of original jurisdiction as those in which they should prefer, in the first instance, any claims they might have to the estate. It will be observed that the period originally allowed them for bringing an action had then expired, and no second period of grace was given. Upwards of four years after this final Order of the *Sudder* had been passed, the Plaintiff in No. 10 of 1856 brings the present action, and a year later the original suit, No. 4 of 1857, is likewise filed. The original suit, No. 2 of 1845, was specially brought to determine the *status* of the late *Zemindar*, and for no other purpose; the evidence was restricted to that point, and, consequently, if ever there was a judgment *in rem*, the decree in that suit, No. 2 of 1845, is one: in that decision it was clearly



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determined that the late *Zemindar* and his brother were undivided. This judgment the Court is not competent now to question, still less to overrule; as a judgment *in rem*, it is conclusive against all the world, and no evidence can be admitted against it, unless it can be shown it was collusively or fraudulently given (*Norton's 'Law of Evidence,'* § 470; *Taylor, 'On Evidence,'* Vol. II. § 1489). *Taylor*, in the section quoted, says, 'This rule appears to rest partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society that the social relations of every member of the community should not be left doubtful, but that, after having been clearly defined by one solemn adjudication, they should conclusively be set at rest. And in the following section, 1490, it is further stated, that 'the decision cannot be impeached in the same or another Court, by showing that the facts on which it immediately rests are false.' The Court is not aware on what grounds permission was granted by the *Sudder* *Adawlut* to the Plaintiffs to bring the suits; the avowed object of which was to impeach this judgment *in rem*; but the period of grace passed without any suit being brought, and no further period was allowed. Possibly the *Sudder* Court, in reconsidering the matter, discovered that they were not competent to grant it; or the omission may have been an oversight. As, however, on the former occasion, that Court gave only eighteen months, it is to be presumed further grace, if it had been given, would not have exceeded a like period. Be this, however, as it may, in the absence of any precedent warranting such impeachment of a Judgment *in rem*, and being of opinion 'that nothing can

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be more inconvenient or dangerous than a conflict of decisions in different Court ; and that if judgments *in rem* are not regarded as binding upon all Courts alike the most startling anomalies may occur' (*Taylor* 'On Evidence,' § 1493), this Court is unable to accept the pleadings of the Plaintiffs on the *status* of the late *Zemindar*, save as an undivided brother. This *status* being thus determined, it only remains to see if the Plaintiffs have by law any claim to the estate.' The Plaintiff, in original suit, No. 10 of 1856, admits she has none, save on the ground that it was self-acquired, and pleads the law as laid down in Vol. II. of *Macnaghten's* 'Hindu Law,' pp. 33, 152, 153, and 155, and establishing her right. A reference to which by the Plaintiff's *Vakeel* would have shown him that the law therein propounded has reference solely to 'partition of property,' not 'succession,' and that it is clearly laid down in the preceding para., in p. 33, that after the death of the widow, the property becomes 'vested in the heirs of her husband,' but here she is, not a widow, but a daughter; the law, therefore, which treats of widows is of no avail to her, but rather the contrary. The Pundits of the *Madras* and *Bengal Sudder* Courts are unanimous that the estate of the late *Zemindar* would descend to his 'window only if he was of a divided family. Under the above circumstances, this Court is of opinion that the Plaintiff in the original suit, No. 10 of 1856, has no claim in law to the estate sued for, and, therefore, directs that the suit be struck off the file without going into the other objections raised by the Defendant in his answer, the Plaintiff paying all costs. The Court's refusing for refusing to allow the Plaintiff, in suit, No. 10 of 1856, to plead that the brothers

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were divided, are equally applicable to the case of the Plaintiff in the suit, No. 4 of 1857. She bases her claim to the estate on the law propounded in the *Futwakis* of the Pundits filed in this and the suits referred to above; these, however, all refer to widows, and not daughters, and declare widows only entitled to succeed to their husband's, ancestral and self-acquired estate when he is one of a divided family. The Court, therefore, is of opinion, that she also has failed to show that she has any claim at law to the estate sued for (*Vide Strange's "Manual,"* pars. 346, 337, 339, 340, and 342); and, without going into the other objections raised in the answer to her right to sue, resolves to strike off her suit likewise from the file, she paying all costs. The Court, in continuance, would observe, that though it has taken the late Judge's decision in suit, No. 2 of 1845, as a judgment *in rem*, and, therefore, not to be impeached, yet that, after a careful study of the whole case (which has occupied it almost incessantly for a period of six weeks), it fully concurs with the late Judge in all he has urged in that decree and the judgment awarded by him. The Judicial Committee of the Privy Council, in their judgment (g), distinctly declare 'it exceedingly desirable that it should be known (not by the parties to the suit alone, but) to all those who are interested in this property, that the question of fact as to division or no division appears to be the only point on which the main question of title to the property will ultimately depend.' By thus declaring, this Court understands that the question of *status* being about to be

decided, all interested were then invited to come forward to prove their assertions to division or non-division, as the decision given would be final. There cannot be a doubt that the Plaintiffs in the above suits were thoroughly acquainted with the decree of the Judicial Committee of the Privy Council ; and it was for their interest to have assisted *Anga Moottoo Natchiar* to prove division, and see that all the evidence procurable was then advanced, and that the decision passed on the merits by the Civil Court (unless such decision is ruled to be only equivalent to an adjudication of settlement by order of Justice) is conclusive against all the world as regards the *status* of the late *Zemindar* ; but allowing that the decree in the suit, No. 2 of 1845, was not final when it was passed, because appealed from, it appears to this Court that it is undoubtedly so now, inasmuch as it cannot be affected by any other suit, and there are no parties competent now to question it in appeal. It is laid down in the *Sudder Adawlut* decrees, No. 58 of 1854, No. 66 of 1855, No. 10 of 1852, No. 5 of 1857, and *Sudder Adawlut* decrees, No. 86 of 1854, par. 19, that non-division is to be presumed until division is proved ; non-division was the alleged state of the family when the suit was brought ; non-division was the decision passed after a prolonged and patient investigation in the suit, No. 2 of 1845, and non division was the *status* when the Plaintiff (Appellant) died. Such being the case, how can the Plaintiffs' claims, which are based and only sustainable on the ground that division had taken place, be admitted ? If they can be, where is the limit, and what becomes of the rule, that judgments *in rem* are conclusive against all the world ?"

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The Appellant appealed to the *Sudder* Court at *Madras* against this decree, praying that the suit might be re-manded for adjudication on the merits.

On the 5th of *November*, 1859, the *Sudder* Court, by its decree, affirmed the decree of the Civil Judge of *Madura* of the 25th of *August*, 1859, on the ground that the question of division had been finally set at rest by the decree in the suit, No. 2 of 1845; that although that decree had been appealed from by the then Plaintiff, *Anga Moottoo Natchiar*, on her death without heirs the appeal had dropped; and that the appeal could not be opened, because the title of the Appellant had not at the time of that decree come into existence.

This was the second decretal Order appealed from to the Privy Council.

The Appellant petitioned the *Sudder* Court for leave to appeal to Her Majesty in Council against the last-mentioned Order, which that Court on the 3rd of *March*, 1860, refused, on the ground, that the decree of the Civil Judge of the 25th of *August*, 1859, was final under sec. 10., Reg. II. of 1802, and cl. 2 & 10, sec. 5 of Reg. XV. of 1816.

This was the third decretal Order appealed from.

Leave was afterwards granted by their Lordships, upon special petition to Her Majesty in Council, to the Appellant to appeal from the decree of the Civil Court of *Madura*, dated the 27th of *December*, 1847, which, with the decrees of the *Sudder* Court of the 19th of *April*, 1852, the 5th of *November*, 1859, and the 3rd of *March*, 1860, and the decree of the Civil Court of *Madura*, dated the 25th of *August*, 1859, were those now appealed from.

The Appellant's two sisters, *Bootaka Natchiar* and

*Kota Natchiar* having died, the Appellant succeeded to their rights, and all the other legal heirs in remainder, after the death of *Anga Moottoo Natchiar*, withdrew their claims, except *Sowmea Natchiar*, who, however, died pending the appeal in *England*.

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The Solicitor-General (Sir R. Palmer) and Mr. W. W. Mackeson, for the Appellant.

Our first proposition is, that the *Zemindary* in question, which constitutes a *Raj*, or principality, and impartible, was the separate, and self-acquired estate of the Appellant's father, *Gowery Vallabha Taver*, and, secondly, that the family property had been divided in his lifetime. He and his eldest brother, *Oya Taver*, were, we contend, by the Hindoo law divided brothers, and the real point now in issue lies between the Appellant, as representing one line of heirs, the lineal female descendants of *Gowery Vallabha Taver* on the one hand, and the Respondent, the lineal descendant of his elder brother, *Oya Taver*, on the other, and is narrowed to the validity of the decree of the Civil Court of *Madura* of the 27th of *December*, 1847, which decree, we submit, was manifestly erroneous. If the sole question to be tried in that suit was division, or no division, the evidence was all one way, and in favour of the Appellant's father and his elder brother, *Oya Taver*, being undivided brothers. The fact of the division was established by the deeds of division, and the actual division in the year 1792 was fully proved by the witnesses in the suit, No. 2 of 1845, as well as by other witnesses incidentally in the suit, No. 4 of 1832. The division was also proved by the fact of the residence of the Appellant's father with the *Rance* at *Shivagunga*, and his living separate from his

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divided brother at *Padamattoor*, previous to and until his installation as the *Zemindar* under the grant from the Government. The adoption of the Appellant's father by the *Ranee*, which, whether, regular or not, was inconsistent with the Respondent's contention of his continuance as part of an undivided family. Then there is the further fact of his installation as *Zemindar*, and his living alone at *Shivagunga*, from the year 1801 until his death in the year 1829, separate from his brother and his family, who resided at *Padamattoor*. These are all circumstances inconsistent with the supposition that he was a member of an undivided family. Again, the leases granted by him as *Zemindar* to his brother and nephews, and the payment by them of *kist*, are all acts which by the Hindoo law are considered the strongest evidence of division. So again, by the *Kazinamah* made in the suit, No. 4 of 1823, after a claim to the division of the *Zemindary* as co-heirs, in which the nephew, *Moottoo Vadooga*, and his brothers, admitted that they had no such right. Separation of interest, or division, is a sole question of fact, which the evidence here fully establishes. In *W. H. Macnaghten's* "Hindoo Law," Vol. I. p. 54, he says, the criterion of division seems to consist of members of the family entering into distinct contracts, and other similar acts, which tend to show that they have no dependence on or connection with each other. *Coleb. Dig.* Vol. III. pp. 415; *Strange* "Hindoo Law," Vol. I. pp. 225-7 [2nd Edit.], *ib.* Vol. II. p. 397, are authorities which establish the same proposition. A partition is presumed if they have separate possession of property. *Than Sing v. Mussu-mant Feettoo* (a). The only evidence in support of

the theory of the family being an undivided family is, that some of the religious ceremonies were jointly performed by the brothers. But such circumstances, even if proved, is held by the Hindoo law to be but slight evidence in favour of the family being undivided, the religious ceremonies being constantly performed by divided brothers. *Strange's* "Manual of Hindoo Law," sec. 296 [edit. 1863]. But we take a higher ground; we contend that even if part of the ancestral estate was at one time common property, yet that the *Zemindary* was self-acquired by the Appellant's father. The grant by the East India Company to *Gowery Vallabha Taver* was an act of sovereignty, the *Zemindary* having escheated for want of lineal heirs. Being by *Sunnud* the grantee takes as purchaser, and the *Zemindary* must, therefore, be considered as self-acquired property, as in the case of confiscation. *The East India Company v. Syed Alli (a) Ellavambadoo Mootiah Moodeliar v. Ellavambadoo Nineapah Moodeliar (b), Keonwur Bodh Singh v. Seonath Singh (c), Mahipat Singh v. The Collector of Benares (d)*. Again, it is an established principle of Hindoo law that property acquired without using the patrimony by one brother living in partnership belongs to him exclusively. *W. H. Macnaghten's* "Hindu Law," Vol. II. pp. 33-152-35. It belongs at his death to the acquirer's individual heir. *Strange's* "Manual of Hindoo Law," sec. 238.

This brings us to the first point, who by the Hindoo law prevailing at *Madras* is to succeed to the *Zemindary* on *Gowery Vallabha Taver's* death? If held in severalty, after his death it undoubtedly goes to his widow, who has, however, no right

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(a) 7 Moore's Ind. App. Cases, 578. (b) 2 Strange's Mad. Cases, 333.  
(c) 2 Ben. Sud. Dew. Rep., 92. (d) 5 Ben. Sud. Dew. Rep., 32.



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to dispose of it. *W. H. Macnaghten's* "Hindu Law," Vol. I. p. 19, *ib.* Vol. II. p. 33; *Strange's* "Hindu Law," Vol. I. pp. 121—137 [2nd edit.]; *Mohun Lal Khan v. Ranee Sirmomunnee* (a), *Keerut Sing v. Koolakul Sing*; (b), *Nund Koowur v. Tootee Sing*; note to *Mussumaut Gyan Koowur v. Dookhurn Singh* (c), *Musst Lalchee Koonwur v. Sheopershad Sing* (d), *Cossinauth Bysack v. Hurrosoondery Dossee* (e). The widow's right in *Madras*, to inherit her deceased husband's property, he dying without issue male, and the family divided, is fully discussed in the *Mitacshara* on Inheritance, ch II., sec. 1, pl. 39; and in the *Daya-Bhaga*, ch. XI. sec. 1, pl. 3. 4. 14; *Coleb. Dig.* Vol. III. ch. CCCXCIX.; *Strange's* "Manual of Hindoo Law," secs. 315. 326 [edit. 1862]; *Strange's* "Hindoo Law," Vol. I. pp. 134-5 [2nd edit.]; *ib.* Vol. II. p. 231, and the opinion of Sir *William Jones*, cited in *Strange's* "Hindu Law," Vol. II. p. 250. The *Sandayar* case (f)

(a) 2 Ben. Sud. Dew. Rep., 32

(b) 2 Moore's Ind. App. Cases, 331; S.C. 4 Ben. Sud. Dew. Rep., 9.

(c) 4 Ben. Sud. Dew. Rep., 330. (d) 7 Ben. Sud. Dew. Rep., 22

(e) Morton's Cal. Rep., 86.

(f) The decree of the Provincial Court for the Southern division, in the suit *Coopasawmy Goolapa Naik v. Yatakamau*, dated the 13th of October, 1826, was filed in this case.

The question there raised was, who was entitled to succeed to the *Zemindary* of *Sandayar*. From the statements laid before the Pundits of the *Sudder Court* for their opinion, it appeared, that the *Zemindary* was an undivided estate, and it was the property of a common ancestor, *A.*; that it was inherited in regular succession by *B.*, *C.*, and *D.*; that *D.*, having no issue, transferred it in his lifetime to his uncle, *E.*, who was the next male heir entitled to inherit, in satisfaction of a claim for money preferred by the latter.

The Provincial Court's questions to the Pundits were, first, whether such transfer could be held to constitute the estate the separate acquisition of *E.*, and, secondly, if such transfer to the exclusion of co-heirs was illegal, whether the widows of *F.*, who

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is on all fours with the present case and strongly in our favour. And in a work called "The Principles of Hindu and Mohammadan Law," by *W. H. Macnaghten*, edited by *H. H. Wilson*, it is laid down at pp. 21, 24, 5 [2nd edit., 1862], that according to the doctrine of the *Smriti Chandrika*, a widow, being the mother of daughters, takes her husband's property, both moveable and immoveable, when the family is divided, and in default of the widow the daughter inherits, *ib.* p. 22. Therefore, on the widow's death the Appellant, as daughter having male issue, succeeded to her father's estate. *Strange's* "Hindu Law," p. 137 [2nd edit.] ; *Mitacshara*, ch. II. sec. 2, p. 341, *ib.* sec. 4, p. 346 ; *Strange's* "Manual of Hindoo Law," sec. 353 [2nd edit.]

Secondly, we are not bound by the decree of the Civil Court of *Madura*, in 1847, which does not preclude our right to ask this Court to determine the question of descent to the *Zemindary*, which, we contend, was self-acquired property by *Gowery Vallabha Taver*. It never could have been the intention of this Tribunal when the case came before it in the year 1844 (a), while observing, that the point of division was the substantial question, to shut out altogether the other material points at issue, succeeded the father *E.*, and died without issue, were entitled to the *Zemindary*, or whether the Plaintiff's title as grandson of the common ancestor was preferable ?

The Pundits' opinion was, first, the gift by *D.* to *E.*, of the *Zemindary* was good, and that it descended to his son *F.*, and, secondly, that as *F.* died without issue the *Zemindary* devolved upon his widows.

(a) See *Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver v. Rany Anga Moottoo Natchier*, 3 Moore's Ind. App. Cases, p. 294.

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raised in that case. We contend, therefore, that even if the brothers were undivided as to their ancestral property, the self-acquisition of one undivided brother dying without male issue, descended to the widow; and after her death, to daughters, in preference to his brother and nephews. This rule of succession in *Madras*, is clear law, according to the authorities already cited.

Thirdly, the opinion of Pundits taken in the suits, as to the right of succession, cannot be relied on. The opinions which appear to have governed the Court below proceed on the assumption that the Text Books they cite apply to the case they were called to report upon, but the opinions unaccountably neglect to say if such authorities are applicable to the particular facts stated. The daughter's right to succeed not being mentioned in the texts cited, the Pundits seem to consider that the Appellant is not entitled. The cases of *Myna Boyee v. Oottaram* (a) and *Abraham v. Abraham* (b) are authorities showing the value to be attached to the Pundits' opinions, and the necessity of the appellate Court testing their accuracy, as well as that the questions put by the Court correctly state the point at issue.

Fourthly, as to the effect of the *Razinamah* executed by the widows in 1830, being binding on them, we submit, that a native woman can never be deemed sufficiently *sui juris* to be bound by her personal acts. Error and ignorance of their rights as widows rendered the agreement invalid. *Narsummal v. Lutchmana Naic* (c), *Chellummah v. Garrow* (d), *Rajunder Narain Rae v. Bijai Govind Sing* (e).

(a) 8 Moore's Ind. App. Cases, 400.

(b) *Ante*, p. 195.

(c) 2 Strange's Mad. Cases, 16.

(d) *Ib.*, 159.

(e) 2 Moore's Ind. App. Cases, 181.

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Lastly, we insist, that the refusal of the *Sudder* Court to allow the Appellant to revive the appeal from the decree of the Civil Court of *Madura* of the 27th of *December*, 1847, was arbitrary and contrary to equity. Notwithstanding the proceedings by her in the suit, No. 10 of 1856, the Appellant was entitled to appeal from that decree. She, as daughter, having male issue, was heir to her father's estate, and like a remainder-man in *England* the proper party to revive the suit. *Lloyd v. Johnes* (a), *Osborne, v. Usher* (b), *Macqueen's* "Prac. of the House of Lords," pp. 242-250. It must not be forgotten that her title only accrued on the widow, *Anga Moottoo Natchiar's* death, *Roopchund Tilukchund v. Phoolchund Dhurmchund* (c), *Loll Munnee Koonwaree v. Rajah Nemyeneram* (d). The interest of a daughter in the estate of her deceased father is similar to that of a widow, *Hurrydoss Dutt v. Sreemutty Uppoornah Dossee* (e); but even if it should be held that she was not entitled to appeal from the decree of the 27th of *December*, 1847, she certainly was not bound by it, *The Zemindar of Ramnad v. The Zemindar of Yeltiapooram* (f), and in that view that decree could not be pleaded as *res judicata*, or held to be a bar to her original suit, No. 10 of 1856, which was instituted in due time after the death of *Anga Moottoo Natchiar*.

Sir *Hugh Cairns*, Q. C., Mr. *Hobhouse*, Q. C., and Mr. C. P. *Phillips*, for the Respondent.

First, we insist, that *Oya Taver* and *Gowery Vallabha Taver* were undivided brothers, and that from *Gowery*

(a) 9 Ves., 57.

(b) 6 Bro. P. C. Cases, 20.

(c) 2 Borr. Bom Rep., 616. (d) 6 Ben. Sud. Dew. Rep., 255-7.

(e) 6 Moore's Ind. App. Cases, 433.

(f) 7 Moore's Ind. App. Cases, 454-5.

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*Vallabha Taver* the *Zemindary* has come by lawful descent to the Respondent, his nephew. The testamentary disposition in his favour by the Appellant's father is not material to our title. We deny the alleged fact of the self-acquisition of the *Zemindary* by *Gowery Vallabha Taver*. It is true that there may be self-acquisition by a member of an undivided family, but the Hindoo law presumes such acquisition for the joint benefit of himself and his co-heirs. *Strange's "Hindu Law,"* Vol. I., pp. 199-225, and the onus lies on a member of a joint family claiming exclusive right to prove that it was separately acquired, *Dhurum Das Pandey v. Mussumat Shama Soondri Dibiah* (a), *Gour Chunder Rai v. Hurish Chunder Rai* (b), *Naraguntty Lutchmedavmah v. Vengama Naidoo* (c), *W. H. Macnaghten's "Hindu Law,"* Vol. I., p. 54, and such presumption of joint partnership must be rebutted by clear evidence of a division of the joint family. What is considered as evidence of division is fully treated by the text writers. *Strange's "Hindu Law,"* Vol. I., pp. 225-7 [2nd edit.]; *ib.*, Vol. II., p. 333. *Mitacshara*, ch. II., sec. 12, pl. 3 and 4, and the cases collected in *Morley's Dig.*, Vol. I. p. 483. Here the division is alleged to have taken place in the year 1792, but the evidence only proves separate residence after the year 1804. The different stations and duties and the health of the elder brother explain their separation, and the distance between their residences was as little as was compatible with those causes. The fact of the impartibility of the *Zemindary* and *Polyaput* of *Padamattoor*, coupled with the fact of the infirmity of *Oya Taver*, satisfactorily account for their separate residences. It has been decided that a

(a) 3 Moore's Ind. App. Cases, 229. (b) 4 Ben. Sud. Dew. Rep., 162.

(c) *Ante*, p. 66.

grant to *A.*, because he is the descendant of *B.*, does not create a self-acquisition in *A.* *Strange's* "Hindu Law," Vol. I., p. 216 [2nd edit.]. Here the lineage of *Gowery Vallabha Taver* to the common ancestor, *Shasavarna*, was the cause of the grant by Government of the *Zemindary* to him. *Oya Traver's* personal incapacity alone prevented his installation as *Zemindar*. The deed of settlement did not limit the succession to the heirs of *Gowery Vallabha Taver*, or do more than confirm the previous grant by Government to him. Now, self-acquisition cannot be the property of one divided in family. It is never mentioned in the text books, except as to property of an undivided member, and as part of the common stock. *Strange's* "Hindu Law," Vol. I., pp. 120, 213, 215 [2nd edit.]. The *Zemindary*, it is admitted, is a *Raj* and impartible, and held by a single person; if it had been otherwise, the co-heirs would have shared in the *Zemindary*. *Strange's* "Hindu Law," Vol. I., p. 218 [2nd edit.]. And they must have been parties to any alienation of it. *Strange's* "Hindu Law," Vol. II., pp. 439, 441, 450 [2nd edit.]. It certainly was not divisible from them, *Strange's* "Hindu Law," Vol. I., p. 260 [2nd edit.], where it is laid down that the issue of self-acquired property inherits as far as great-grandson. *Ib.*, pp. 209, 210. Failing male issue, it goes to his undivided brothers and their issue. *Strange's* "Manual of Hindu Law," sec. 351, p. 34 [2nd edit.]. If the descent of self-acquired property differs from descent of the property of an undivided man, the Appellant should prove that to be the law. The silence of the Books and authorities on any such difference is strongly in the Respondent's favour. The Pundits in the case submitted to them in 1837 have laid it down that there is no such difference. The *Sandayar*

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case (a), relied upon by the Appellant to show the descent to self-acquired property, does not apply, as that case related to a divided family and ancestral estate. Transactions between co-parceners, in order to raise a rebuttal of the presumption of non-division, must be in relation to the property, enjoyable by them in common. *Strange's "Hindu Law,"* Vol. I, pp. 227, 8, 9, 230 [2nd edit.]. Families living together, and carrying on their transactions in common, constitute co-parcenary to which survivorship attaches, *Ib.*, Vol. I, p. 120. Living separately does not *per se* constitute division.

The next point is the title of *Anga Mootto Natchiar* as a Hindoo widow to succeed. Women are generally incompetent to inherit. It could only be to property of a man divided in family. *Strange's "Hindu Law,"* Vol. I. p. 134; *Mitacshara*, ch. II., sec. I., pl. 39. A Hindoo widow has only the right of enjoyment in her deceased husband's property. It is laid down that with respect to property derived by inheritance from her husband, a widow is little more than tenant for life, and trustee for the ulterior heirs. *Strange's "Manual of Hindu Law,"* sec. 159, p. 38 [2nd edit.]. A Hindoo widow must, in a suit by her for her late husband's realty, wherein she claims under his character as a divided member of a Hindoo family, re-present the whole series of his heirs, and a decree in that suit against her negating such division is *res judicata*, and must bind them, because a contrary conclusion would, so long as the descent passed through females, invoke the possibility of endless litigation of such fact of division.

Next, we contend, that the death of *Anga Mootto Natchiar* in 1850, operated as an abatement of the suit, subject to revivor by the next of kin of *Gowery*

*Vallabha Taver*, and we insist, that this Tribunal cannot now entertain an appeal from the decree of the Civil Judge, of *Madura* made in 1847, or enter into any question of division, or self-acquisition. First, as to the question of division. The suits of 1845, and 1849, were wholly abated. The Appellant was not a party thereto, and her claim to immediate heirship to her father on the death of *Anga Moottoo Natchiar* had never been established, and has always been denied by the Respondent; secondly, as to the question of self-acquisition, that fact was clearly not in issue in the suit, No. 2, of 1845, nor dealt with by the decree of 1847. Further, with respect to the decree of the *Sudder Court* refusing the Appellant to revive the appeal, we submit it was perfectly regular, as the *Sudder Court* could not decide the question of heirship. That was a question for the Provincial Court, and thither the Appellant should have, in the first instance, gone. The Appellant's proper course was pointed out to her in the year 1850. The suit that the Appellant ought to have brought, and which it was plain the *Sudder Court* intended her to bring, was one in the nature of a Bill of revivor, or a Bill of supplement, limited to the object of obtaining from the Provincial Court a declaration that she, as the daughter of *Gowery Vallabha Tayer*, had established her right to stand in the place of *Anga Moottoo Natchiar*, but she perversely disregarded it, and filed the suit, No. 10 of 1856, to establish her right and to which suit she did not make the other claimant's parties Defendants. In *Giffard v. Hort (a)*, it was held that a decree made in a suit, without making parties whose rights were affected thereby,

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was fraudulent and void as against those parties. Here she attempted to deceive the Provincial Court, by alleging an Order from the *Sudder Court*, directing the suit, and by concealing her previous claim as third daughter, and the agreement with her sisters, and thereby only raised the issue of division, and did not properly raise the issue of heirship.

Having previously disregarded her proper course pointed out in the year 1850, and twelve years having elapsed since that date, the Respondent ought not to be restrained from setting up the *Mad. Reg. of Limitations II.*, of 1802, sec. 18, cl. 4, in bar to any proceedings the Appellant might hereafter take to revive the appeal from the decree of 1847. She was barred by laches and lapse of time from maintaining any original proceeding for the recovery of the *Zemindary*.

As to the appeal from the decree of 1859, we submit that that decree was right, because the decree of 1847, on the fact of division, could not in fact be appealed by the heirs of *Gowery Vallabha Taver* claiming after *Anga Moottoo Natchiar*, and as to any claim under the alleged self acquisition of the *Zemindary*, that was disposed of in the suit of 1833, and by this Tribunal in 1844, or if not, was raised in suit of 1845.

Lastly, we insist, that the Appellant not having taken the proper proceedings, is not entitled to revive or continue the litigation commenced by *Anga Moottoo Natchiar*. Assuming, however, that the decree of the *Zillah Court* in *December*, 1847, bound the party succeeding at the death of the widow, *Anga Moottoo Natchiar*, the only remedy the Appellant, claiming as a remainder-man, now has, is for this Court to remit the case to the *Sudder Court* to determine the ori-

ginal appeal against the decree of the Civil Court of *Madura*. This Tribunal, as a Court of final appeal, will not adjudicate upon that point until a decree has been made by the Court below, which alone can give it jurisdiction.

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The Solicitor-General, in reply.

Admitting that a Hindoo widow has only a right of enjoyment in her husband's property, *Strange's* "Hindu Law," Vol. I. P. 124, *ib.* Vol. II. pp. 251-3 [2nd edit.], *Daya-bhaga*, ch. XI. sec. 1, Pl. 56, and that the widow's litigation was ill conducted, yet her husband's heirs, who succeed on her death, are not bound by her miscarriage. A remainder-man may rectify error, or supply omissions, *Lolyd v. Jones (a)*, where the point is carefully considered by Lord *Eldon*. Here the Appellant, as daughter, was the heir of her deceased father, *Coleb. Dig.* Vol. III. pp. 186, 489, 491, 498, *Daya-bhaga*, ch. XI. sec. 2, pl. 1, the *Sandayar* case (*b*), and had a right to bring a new suit, and raise the proper question relating to the succession of the *Zemindary*, namely, the separate acquisition of the *Zemindary* by her father, which fact was established in evidence, and, consequently by the Hindoo law, even if they were an undivided family, neither his brother nor his nephew, could succeed to the *Zemindary*, *Macnaghten's* "Hindu Law" Vol. II. p. 156.

Judgment was reserved, and now delivered by

The Right Hon. the LORD JUSTICE TURNER.

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The subject of this appeal, and of the long litigation which has preceded it, is the *Zemindary* of *Shiva-*

(a) 9 Ves.; 60.

(b) *Ante*, p. 578.

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*gunga*, in the District of *Madura* and Presidency of *Madras*.

This *Zemindary* is said to have been created in the year 1730, by the then *Nabob* of the *Carnatic*, in favour of one *Shasavarna*, on the extinction of whose lineal descendants in 1801, it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the *Nabob* of the *Carnatic*, and was granted by the *Madras* Government to a person whom we shall distinguish by one of his many names, as *Gowery Vallabha Taver*. He had an elder brother named *Oya Taver*, who predeceased him, dying in 1815. The *Zemindar* himself died on the 19th of *July*, 1829.

He had had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter (since dead), who left a son named *Vadooga Taver*; the second had a daughter named *Bootaka Natchiar*; the third had two daughters, *Kota Natchiar* and *Katima Natchiar*, the present Appellant; and the fourth was childless. The three surviving widows were *Anga Moottoo Natchiar*, *Purvata Natchiar*, and *Moottoo Verey Natchiar*. Of these *Purvata Natchiar* was *enceinte* at the time of her husband's death, and afterwards gave birth to a daughter named *Sowmia Natchiar*. The two others were childless.

*Oya Taver*, the brother, left three sons, of whom the eldest was named *Moottoo Vadooga*.

The *Zemindary* is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to

it is now admitted to be that of the general Hindoo law prevalent in that part of *India*, with such qualifications only as flow from the impartible character of the subject.

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Hence if the *Zemindar*, at the time of his death, and his nephews were members of an undivided Hindoo family, and the *Zemindary*, though impartible, was part of the common family property, one of the nephews was entitled to succeed it on the death of his uncle. If, on the other hand, the *Zemindar*, at the time of his death, was separate in estate from his brother's family, the *Zemindary* ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestable; but *Gowery Vallabha Taver's* widow and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late *Zemindar* continued to be generally undivided in estate with his brother's family, this *Zemindary* was his self acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the *Zemindary* was to be treated as self-acquired separate property, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of *Gowery Vallabha Taver*, at least on the failure of his

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male issue, being demonstrated by the birth of his posthumous daughter, his nephew, *Moottoo Vadooga*, obtained possession of the *Zemindary*. He seems to have set up an instrument which in the proceedings is called a Will. On the Appellant's side this is treated as a forgery. The Respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title; and it may, therefore, be dismissed from consideration. *Moottoo Vadooga* obtained possession with the concurrence of various members of the family, and of Government and its officers. He afterwards obtained from the then three surviving widows the *Razinamah*, or agreement. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July, 1831; and was then succeeded by his eldest son, *Bodha Gooroo Sawmy Taver*.

Soon after this event began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the first beginning with the institution of suit, No. 4, of 1832, and ending with the Order of the Queen in Council in 1844; the second beginning from the date of that Order, and ending with the death of the widow, *Anga Moottoo Natchiar*, on the 23rd of June, 1850; and the third being that which covers the proceedings which have been had since *Anga Moottoo Natchiar* died.

The suit, No. 4 of 1832, was brought by *Velli Natchiar*, the daughter of *Gowery Vallabha Taver* by his first wife, on behalf of her infant son, *Moottoo Vadooga*. It claimed the *Zemindary* for the infant by virtue of an *Arse* said to have been sent by the Collector to *Gowery Vallabha Taver* in 1822, according to which the succession would be to the son of a daughter in preference

to his widows, and *à fortiori* in preference to his brother's descendants. The defence to this suit insisted that the *Zemindary* had been granted to *Gowery Vallabha Taver* solely in consequence of his relationship to the former *Zemindars*, and was, therefore, to be treated as part of the undivided family estate, and, as such, descensible to the eldest of the male co-parceners in preference to any descendant in the female line from *Gowery Vallabha Taver*. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the *Zemindary* was to be regarded as the self-acquired and separate property of *Gowery Vallabha Taver*, and ought to pass by virtue of the *Arze* to the Plaintiff.

In 1833, two other suits were instituted against the *Zemindar* in possession. Of these, that distinguished, as No. 4 may be left out of consideration, inasmuch as the Plaintiff in it rested his title on an alleged adoption by *Gowery Vallabha Taver*, of which he failed to give satisfactory proof. Such a title, if established, would of course have been paramount to the claims of either the nephews or the widows.

Suit 3, of 1833 is, however, the most important, with reference to this appeal, of the three suits now under consideration. It was brought by *Anga Moottoo Natchiar*, the fifth wife, and the elder of the three widows of *Gowery Vallabha Taver*. She set up an adoption, or *quasi* adoption, of *Gowery Vallabha Taver*, by the widow of the last *Zemindar* of the elder line, and treated this as the consideration, or a principal consideration, for the grant of the *Zemindary* made to him by the East India Company, and she insisted that *Moottoo Vadooga Taver*, on her husband's death, got possession of the *Zemindary*, of which she was

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the legal heiress, by means of the forged Will. The defence to this suit, so far as it related to the title of the *Zemindar* in possession, was substantially the same as that made to the suit, No. 4 of 1832; but it also denied the alleged forgery of the Will, and insisted on the *Razenamah* executed by *Anga Moottoo Natchiar* and the other widows to *Moottoo Vadooga Taver*. In her reply, *Anga Moottoo Natchiar* did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the *Zemindary* had been acquired by the sole exertions and merits of her husband; and as an issue of law, that what is acquired by a man, without employment of his partimony, shall not be inherited by his brothers and coheirs, but if he dies without male issue shall descend to his widows, his daughters, and parents; before going to his brothers or remoter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the decree or decrees of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them a distinct issue, whether *Gowery Vallabha Taver* and his nephews were or were not an undivided Hindoo family, some evidence was given in the suit, No. 4 of 1832, to show that he and his brother were separate in estate. There was an appeal in each of the three suits, and these were heard together, and disposed of by the decree of the *Sudder Court*. That decree dismissed No. 4 of 1833, on the ground that the Plaintiff had failed to prove his alleged adoption by *Gowery Vallabha Taver*, and it dismissed No. 4 of 1832 on the ground that the succession to the *Zemindary* was governed by the general Hindoo law, and not by

any particular or customary canon of descent ; so that, if descendible as separate estate, it would go to the widows of *Gowery Vallabha Taver* in preference of a grandson by a daughter. In the suit No. 3, of 1832, it was decided, first, that as a matter of fact the *Zemindary* was the self-acquired and separate property of *Gowery Vallabha Taver* : secondly, that according to the opinion of the Pundits whom it had consulted, the rule of succession to the *Zemindary*, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate ; that in the former case it would belong to the widow, and in the latter to the nephew ; thirdly, that upon the whole evidence the brothers must be taken to have divided their ancestral property ; and lastly, that the Plaintiff, *Anga Moottoo Natchiar*, was entitled to recover the *Zemindary*, not having forfeited her rights by the execution of the *Razinameh*.

Against this decree the *Zemindar* then in possession appealed to Her Majesty in Council. The Order made on that appeal on the 19th of June, 1844, was that the decree of the *Sudder Court* should be reversed, with liberty to the Respondent, *Anga Moottoo Taver*, to bring a fresh suit, notwithstanding the decree of the Provincial Court, at any time within three years from the filing of that Order in the *Sudder Dewanny Adawlut*. The grounds on which their Lordships who recommended this Order proceeded were, as appears from the judgment delivered by Dr. *Lushington*, that the *Sudder Court* had miscarried in deciding the question of division, which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the Respondent ought to be allowed to remedy the

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omission in a new suit. And their Lordships added, that though they could make no Order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property that the question of division or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.

On the 20th of August, 1845, *Anga Moottoo Natchiar* commenced her second suit *in forma pauperis*. In the interim *Bodha Gooroo Swamy Taver* had died, and the *Zemindary* had passed to his brother, *Gowery Vallabha Taver*, the father of the Respondent, and he with a younger brother were the Defendants to the new suit. In her plaint the widow, after stating the pedigree of the family, some of the former proceedings, and the desire of *Velu Natchiar*, the widow of the last *Zemindar* of the elder line, to make *Gowery Vallabha Taver*, the first of that name whom we have mentioned, her successor, proceeds to allege, that with that object she had caused him and his elder brother, *Oya Taver*, to make a partition of their ancestral property as early as the year 1792. The Plaintiff then excuses her omission to plead this fact in the previous suit by saying that she had been advised it was only necessary for her to show that her husband had been adopted by *Velu Natchiar*, and that the *Zemindary* was his self-acquisition. She then proceeds to allege, that on the death of *Velu Natchiar*, he actually became *Zemindar* until he was dispossessed by the usurpers; on whose defeat and destruction by the East India Company, he was again put into possession under their grant. She also in this suit makes the alternative case, that even if no partition of their ancestral

property took place between *Gowery Vallabha Taver* and his brother *Oya Taver*, she, as the eldest widow, was entitled to the *Zemindary*, as a separate acquisition, in preference to that brother's descendants, and pleads the decision, in what is called the *Sandayar* case, to prove that such is the Hindoo law, and that the opinion given in the former case by the Pundits to the contrary was erroneous.

In his answer, the first and principal Defendant recapitulated the several facts relied upon by *Bodha Gooroo* in the former suit as constituting his title. He insisted that by the decision of the Judicial Committee of the Privy Council the contest was narrowed to the issue whether the brothers were undivided in estate or not, and that the Plaintiff should have rested her claim on that issue. He contended that there had been no partition. The points recorded in the suit are thus somewhat vaguely stated:—"The Plaintiff to prove, by means of documents and witnesses, that division took place in 1792. As the defence is but a denial of this circumstance, the Defendant cannot be called upon to establish the negative side by direct proof. But the Defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use, if possible, strong arguments against the points particularly spoken of by the Plaintiff."

A large body of evidence is, in fact, given by each side on the question of division or non-division. The case was heard by the Civil Judge, Mr. *Baynes*, whose decree is dated the 27th of *December*, 1847. The effect of it was, that the only question really open between the parties was that of division or non-division; that the Plaintiff had failed to prove the partition between *Gowery Vallabha Taver* and his

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brother, *Oya Taver*; and that her suit must be dismissed with costs.

Against this decree, on the 6th of *April*, 1848, *Anga Moottoo Natchiar* appealed to the *Sudder Court*. The Defendant, *Gowery Vallabha*, then died, and his infant son, the present Respondent, came in, and on the 5th of *November*, 1849, filed an answer to the appeal. Before the appeal was heard, and on the 24th of *June*, 1850, *Anga Moottoo Natchiar* also died, and with her death ended the second stage of this long litigation.

On the death of *Anga Moot too Natchiar* the Court seems to have issued a notice in the form, ordinarily used on the abatement of an appeal by the death of an Appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. This form of notice, it is obvious, was not strictly applicable to a case like the present, where, upon the death of a Hindoo widow, the right of action formerly vested in her devolves not upon her heirs, but upon the next heirs, of her husband; and to this circumstance may be traced some of the confusion which is observable in the subsequent proceedings. Such as it was, however, the notice brought into the field three sets of claimants. The first consisted of *Boolaka Natchiar*, the daughter of *Gowery Vallabha Taver* by his second wife, and *Kota Natchiar* and the present Appellant, his daughters by his third wife. They claimed as the rightful heirs of the *Zemindary*, if it passed as separate property, next in succession to the widow, *Anga Moottoo Natchiar*; but considering its impartible nature, they expressed their willingness that it should be enjoyed first by *Boothaka Natchiar* for her life, next by *Kota Natchiar* for her life, and lastly by the Appellant. They treated *Sawmia Natchiar*, the daughter by the

sixth wife, as excluded from the succession by reason of her marriage with *Bodha Gooroo*, and of her being then a childless widow.

*Sowmia Natchiar*, however, came forward by a separate petition, claiming to be heiress both to *Anga Mootoo Natchiar* and the *Zemindary*, by virtue of an instrument alleged to have been executed by *Anga Mootoo Natchiar* in her lifetime.

A third claimant was *Mootoo Vadooga*, the Plaintiff in the dismissed suit of 1832. His contention was, that though the decree in that suit may have been right in preferring to his claim that of *Anga Mootoo Natchiar*, his title as grandson was nevertheless preferable to that of daughters, and that on the death of the widow he became entitled to the *Zemindary*.

Counter-petitions were filed on behalf of the Respondent, objecting to the revival of the appeal by any of these claimants; and it is observable that he then insisted that they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of *Anga Mootoo Natchiar*.

The *Sudder Court*, in dealing with these claims to prosecute the appeal, has made three different and inconsistent orders.

By the first, dated 21<sup>st</sup> of *October*, 1850, it held that none of the claimants could prosecute the appeal, which it directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30<sup>th</sup> of *April*, 1851.

They all petitioned for a review of this Order; counter-petitions were filed on behalf of the Re-

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spondent ; and the Court, by its Order of the first of *May*, 1851, notwithstanding an adverse opinion given by its Pundits on the 7th of *March* preceding, reversed its former Order, and directed the appeal to be replaced on the file, and the several claimants to be made supplemental Appellants ; resolving to hear the appeal, and, if it should be sustained, to determine the mode in which their rights as against each other and the Defendant should be tried.

On the 19th of *April*, 1852, the Court, apparently of its own mere motion on taking up the record of the appeal, reversed this Order of the 1st of *May*, 1851, and ruled that the several claimants could not be heard on the appeal, but might prosecute their respective rights in the Court of first instance, which Court was to be guided in the admission and hearing of their claims by the Regulations in force, and the appeal was again removed from the file.

Thereupon the Respondent shifted his ground, and by a petition dated the 30th of *June*, 1852, objected to the last Order and prayed for a review of it. His contention then was, that the heirs next in succession to *Anga Mootoo Natchiar*, according to that course of succession, might have been admitted to carry on the appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its proceeding of the 16th of *September*, 1852, adhered to its Order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of *Gowery Vallabha Taver* who joined in the first of the above-mentioned applications to the *Sudder* Court, the Appellant alone brought a fresh suit. The plaint was not filed until the 5th of *December*, 1856, but there seem to have been various intermediate proceedings before both the *Zillah* and

*Sudder* Courts. These are referred to in the Appellant's petition of appeal, but are nowhere stated in detail. Her plaint stated, that her father and his brother, *Oya Taver*, were divided in estate prior to 1801, and were then living separately; that the *Zemindary* was granted exclusively to the former, and was, therefore, his self-acquisition, and enjoyed by him in exclusion of his brother.

The Appellant's title in succession to *Anga Mootoo Natchiar* is thus stated:—"The *Zemindary*, which is the self-acquisition of the Plaintiff's father after his division with *Oya Taver*, belongs on the death of his widow *Anga Mootoo Natchiar*, to his second daughter, the Plaintiff, who has male and female issue: whilst his first daughter, *Bootaka*, has no issue, and the third daughter, *Sowmia*, is a widow." In the seventh paragraph (though the point is not taken so distinctly as in the suit of *Anga Mootoo Natchiar*) she claims the *Zemindary* as her father's self-acquisition, irrespectively of the alleged partition with his brother, and the question of division.

The answer took a formal objection to the suit, namely, that it was brought against the guardian of the infant *Zemindar*, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of Limitation and the decree of the 27th of *December*, 1847, as bars to the Appellant's claim. It further impeached her title as the heir next in succession to *Anga Mootoo Natchiar* in that line of succession, alleging that there were descendants of *Gowery Vallabha Taver* through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845, as constituting the title of the infant *Zemindar*.

The estate being then in the custody of the

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Court of Wards, the Collector was made a Defendant, and put in a similar answer. Replies and rejoinders were filed; but without settling any issues or taking any evidence in the cause. The *Zillah* Judge, Mr. *Cotton*, on the 25th of *August*, 1859, dismissed the suit, together with the suit, No. 4 of 1857, which had been instituted by *Sowmia Natchiar*, but with which we have no concern. His reasons for dismissing the Appellant's suit were:—first, that upon the question of division she was concluded by the decree of 1847, which he treated as a judgment *in rem*, made final by the removal of the appeal from the file; and, secondly, that it was clear upon the opinions of the Pundits, that the *Zemindary*, whether self-acquired or not, could not descend to the widow, nor, *à fortiori*, to a daughter, except in the event of the *Zemindar* having been of a divided family.

The Appellant appealed from this decision to the *Sudder* Court, praying that the suit might be remanded for adjudication on the merits. Her appeal was dismissed by a decree, dated the 5th of *November*, 1859. The *Sudder* Court seems also to have considered that by the dropping of the appeal on *Anga Mootoo Natchiar's* death the decree of 1847 had become final, and, as such, was an effectual bar to the Appellant's claim. On the 3rd of *March*, 1860, the *Sudder* Court refused to give the Appellant leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of this Committee.

The present appeal is against the decree of the *Sudder* Court of the 5th of *November*, 1859, and its Order of the 3rd of *March*, 1860, and the decree of the 25th of *August*, 1859. It is also against the Order of the *Sudder* Court of 1852, and the decree of the Civil Court of *Madura* of the 27th of *December*,

1847. If therefore, the latter decree is in truth a bar to the Appellant's obtaining effectual relief in her original suit, the appeal seeks by reopening that decree to remove the bar.

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And here, before going further, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this decree which was propounded by the *Zillah* Judge when dismissing the suit of 1856; because if unnoticed here, as it seems to have been unnoticed by the *Sudder* Court, it may find acceptance with other unprofessional Judges, and embarrass the course of justice in *India*. Their Lordships would otherwise think it unnecessary to observe that a judgment is not a judgment *in rem*, because in a suit by *A.* for the recovery of an estate\* from *B.* it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular judgment was nothing but a judgment *inter partes*; and the only question which could properly arise concerning it in the suit of 1856 was to what extent, as such, it was binding on the Appellant. \*

Their Lordships also feel constrained to observe that the various proceedings which have taken place since *Anga Mootoo Natchiar's* death have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by anything approaching to a regular course of trial and adjudication. When *Anga Mootoo Natchiar* died, the decree of 1847 was not a final decree. An appeal was pending against it. Either it was binding upon those who in the event of her title being a good one would succeed to the *Zemindary*, or, it was not. Those persons were obviously not her heirs,\* but the next heirs of her husband according to the canon of Hindoo law,



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which defines the succession to separate estate. It ought not, their Lordships conceive, to have been a difficult matter to ascertain the persons answering to this description. If the decree were in its nature binding on them, they, when ascertained, ought to have been allowed to prosecute the appeal. If the decree were not binding upon them, it ought not to have been treated as an obstacle to the full trial and adjudication of their rights in an original suit. The *Sudder* Court, however, after making two other and inconsistent Orders, referred the parties to an original suit; and yet a suit of that nature when brought by the Appellant has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the decree of 1847. Therefore, she has fallen, so to speak, between two stools. She has had neither the benefit of the appeal against the decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here that for this result, the Appellant is herself solely responsible; that the suit which she ought to have brought, and which the *Sudder* Court intended her to bring, was one in the nature of a Bill of revivor, or a Bill of revivor and supplement, limited to the object of obtaining from the *Zillah* Court a declaration that she had established her title to stand in the place of *Anga Mootoo Natchiar*, and carry on the former suit. Whether the procedure of the Courts of the East India Company admitted of such a suit (and no precedent of one has been produced), their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the *Sudder* Court had in its contemplation.

when it made its Order of 1852. The omission to reserve the hearing of this appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the Respondent himself in his counter-petitions filed in opposition to the first applications for leave to prosecute the appeal—all point to the conclusion that the new and original suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

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The subsequent and obscure Order of the 16th of September, 1852, is hardly inconsistent with this, though it seem to contemplate that the decree of 1847 might prove an effectual bar to the suit which the Court itself had directed. Yet if there was ground for this apprehension, in what a position had the *Sudder* Court placed the claimants? It had denied to them the power of prosecuting the appeal; it had thereby made final that which was not in its nature final; and having thus tied their hands, it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the decree of 1847, when final, was binding on the claimants, the *Sudder* Court ought either to have dealt with the appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that decree.

In either view of the case, therefore, there was a grave miscarriage of justice in the earliest Order of the *Sudder* Court which is appealed against, viz. that of the 19th of April, 1852.

It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the

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decree of 1847, if it had become final in *Anga Mootoo Natchiar's* lifetime, would have bound those claiming the *Zemindary* in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zillah* Court by any person claiming in succession to *Anga Mootoo Natchiar*. For assuming her to be entitled to the *Zemindary* at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

But, then, assuming that the succeeding heirs would be so bound, it was strongly insisted on the part of the Respondent that this Committee can do no more than remit the cause, with directions to the *Sudder* Court to hear and determine the appeal against the decree of 1847; that it cannot itself deal with the merits of a decree of the Civil Court, until they have been determined by the appellate Court. Their Lordships, however, are not of that opinion. The appeal was ripe for hearing by the *Sudder* Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully

argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to make the Order which the *Sudder Court* ought to have made in 1852, and that it is their duty to do so.

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The substantial consent between the Appellant and the Respondent is, as it was between *Anga Mootoo Natchiar*, and the Respondent's predecessors, whether the *Zemindary* ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions:—

First. Were *Gowery Vallabha Taver* and his brother, *Oya Taver*, undivided in estate, or had a partition taken place between them.

Second. If they were undivided, was the *Zemindary*, the self-acquired and separate property of *Gowery Vallabha Taver*? And if so—

Third. What is the course of succession according to the Hindoo law of the south of *India* of such an acquisition, where the family is in other respects an undivided family?

Upon the first question their Lordships are not prepared to disturb the finding of Mr. *Baynes* in the decree of 1847. There are undoubtedly strong reasons for concluding that *Gowery Vallabha Taver* and his brother, after the acquisition by the former of the *Zemindary*, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very inconsiderable in comparison of the separately enjoyed *Zemindary*. And *Anga Mootoo Natchiar*, having admitted that the brothers had been joint in estate, and alleged a partition

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at a particular place and time, took upon herself the burden of proving that partition; a burden from which it must be admitted she has not satisfactorily relieved herself. Nor can their Lordships in considering this question be unmindful of the presumption which arises from the lateness of the period at which the allegation of division was first made; and from the silence of the parties in the suits of 1832 and 1833, as well as in the suit of 1823, which is mentioned in these proceedings, upon the subject of a partition which, if it had ever taken place, must have been in the knowledge of all the members of the family.

The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the *Zemindary* as the self-acquired property of *Gowery*, *Vallabha Taver*. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the *Zemindars* of the former line does not, their Lordships apprehend, bring this case within the rule cited from *Strange's "Hindu Law"* by Sir *Hugh Cairns*.

The third question is one of nicety and of some difficulty. The conclusion which the Courts in *India* have arrived at upon it, is founded upon the opinion of the Pundits, and upon authorities referred to by them. We shall presently examine those opinions and authorities; but before doing so, it will be well to consider more fully the law of inheritance as it prevails at *Madras* and throughout the southern parts of *India*, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of *India* is to

be found in the *Mitacshara*, and in ch. II., sec 1, of that work the right of widows to inherit in default of male issue is fully considered and discussed.

The *Mitacshara* purports to be a commentary upon the earlier institutes of *Yajnyawalkya*; and the section in question begins by citing a text from that work, which affirms in general terms the right of the widow to inherit on the failure of male issue. But then the author of the *Mitacshara* refers to various authorities which are apparently in conflict with the doctrines of *Yajnyawalkya*, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favour of widows; and, consequently, that in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed the whole chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in

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part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that because widows take the whole estates of their husbands when they have been separated from, and not subsequently reunited with, their co-heirs, and have died leaving no male issue, they cannot, when their husband's have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed, in the first place, that the general course of descent of separate property according to the Hindoo law is not disputed. It is admitted that, according to that law, such property descends to widows in default of male issue. It is upon the Respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done, is by showing a general state of co-parcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of co-parcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of a united Hindoo family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain

on a part division of joint property, is apparent from a passage in *W. H. Macnaghten's* "Hindu Law," title "Partition," vol. I. p. 53, where it is said as follows: "According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property; in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

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Again, it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequences; the sons taking their father's share in the ancestral property subject to all the rights of the coparceners in that property, and his self acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that, according to the Hindoo law, there need not be unity of heirship.

But to look more closely into the Hindoo law. When property belonging in common to a united Hindoo family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the



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same rule apply to property which from its first acquisition has always been separate? We have seen from the passage already quoted from *Macnaghten's* "Hindoo Law," that were a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property and of the interest in it.

Again, there are two principles on which the rule of succession according to the Hindoo law appears to depend; the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 *Strange's* "Hindu Law," p. 135). But some ancient authorities also invoke the other principle. *Vrihaspati* (3. *Coleb.* Dig. 458, tit. cccxcix; see also Sir *William Jones'* paper cited in 2 *Strange's* "Hindu Law," p. 250), says: "Of him whose wife is not deceased half the body survives; how should another take the property while half the body of the owner lives?" Now, if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For it is upon this principle that she is preferred to his divided brothers in the succession

to a separate estate. But it is perfectly intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should override the widow's right of succession, whether based upon the spiritual doctrine, or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualification of the widow's right established by the *Mitacshara*, whatever be its extent, must be taken to depend. If this be so, we can hardly, in a doubtful case, and in the absence of positive authority, extend the rule beyond the reasons for it. According to the principles of Hindoo law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to any superior right of the co-parceners in the undivided property.

Again, the theory which would restrict the preference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir *Thomas Strange*, are so intimately connected that they may almost be said to be blended

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together; and it is surely ~~not~~ consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may further observe, that the view which we have thus indicated of the Hindoo law is not only, as we have shewn, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindoo being a member of a united family having common property, and being himself possessed also to separate property. He may be desirous of provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first object without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed to consider the opinions of the Pundits and the authorities referred to by them.

The case appears to have been referred to the Pundits on several occasions. The first of these references was made by the *Zillah* Court in 1833, in the suit No. 4 of 1832. The answer of the Pundits bears date the 28th of *October* in that year. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

These fuller statements were made by the same Pundits in answer to references directed by the *Sudder* Court before making the decree of the 17th of *April*, 1837 (a). The answers are dated the 28th of *December*, 1836, and the 16th of *January*, 1837.

On examining the reasons on which the Pundits

(a) See questions and answers, 3 Moore's Ind. App. Cases, 282.

rest their opinions, it is to be observed that they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from *Vrihaspati* and as to the text in the *Mitacshara* to which they refer; but they leave untouched the question which they ought to have considered, whether these authorities do or do not affect this particular case. What we have already said as to the text from the *Mitacshara*, and what we shall presently say as to the passages from *Vrihaspati* is, we think, a sufficient answer to this part of the reasons on which the Pandits found their opinion. Then again, they point to the distinction between obstructed and non-obstructed heritage; and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

But the whole of this last argument seems to be founded on the passages in the *Mitacshara* contained in clauses 2 and 3 of section 1, chapter 1; and these passages, when examined, clearly appear to be mere definitions of "obstructed" and "non-obstructed heritage," and to have no bearing upon the relative rights of those who take in default of male issue. If indeed, the argument which the Pandits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then, to consider the authorities on which the Pandits rely in support of their opinions. They consist of the text from the *Mitacshara* to which we have already so frequently referred, and of passages from *Vrihaspati* and several other commentators on the Hindoo law. We have already intimated our opinion that the text from the *Mitacshara*

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does not apply to this case, and as to the passages from the Commentators they are all of equivocal import. They may, or may not, have been intended to apply to a case like the present, and if there was nothing more to be found upon the subject they might or might not be thought sufficient to warrant the opinion which the Pundits have founded upon them; but these passages seem to be the same passages, or passages similar to those, which were brought forward before the time of the *Mitacshara*, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from *Nareda*. These authorities failed when contrasted with conflicting passages in the works of other Commentators, of which the Pundits in this case have taken no notice, to negative the right of the widow where the property was wholly separate; and as they have failed to this extent, we cannot but think that the Pundits in this case have gone much too far in bringing them forward as uncontradicted authorities in favour of the opinion which they have formed that the widows are not, in this case, entitled to the separately acquired property. It seems to us, too, that the decision in the *Sandayar* case (a)—a decision also founded on the opinion of the Pundits of the *Sudder* Court—is wholly at variance with the opinion of the Pundits in the present case. Whether the Pundits in that case were or were not right in the opinion, that the *Zemindary* became the separate property of the uncle by the transaction between him and his nephew, it is quite unnecessary to consider. All that is important to be considered is, that holding the *Zemindary* to have become the separate

property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion. The Pundits in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the Pundits in the *Sandayar* case, by assuming that the Pundits in that case proceeded upon an idea that the descendants of the common ancestor had been separated but we see no foundation whatever for that assumption. On the contrary, the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case, therefore, stands thus upon the authorities. On the one hand, we have the opinion of the Pundits in this case, which seem never to have been acted upon by any final decree. On the other hand we have the decision in the *Sandayar* case, and the other authorities cited for the Appellant at the Bar, particularly the passage from *Menu*, in Sir *William Jones's* paper, given at *Strange's* "Hindu Law," Vol. II., p. 250 [2nd edit.], and the opinion of the Pundit, *Kistnamachary*, (2 *Strange's* "Hindu Law," p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. *Colebrooke* and *Dorin*.

In this state of things their Lordships cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favour of the Appellant's contention.

We proceed, then, to consider how the *Sudder* Court ought to have dealt with this case after *Anga Mootoo Natchiar's* death, and we are of opinion, that

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that Court ought upon the applications made by the different parties claiming to prosecute the appeal, to have determined which of the parties was so entitled. We are of opinion, that *Sowmia Natthiar* and the grandson were not so entitled, and that their claims, therefore, ought at once to have been dismissed. The claims of the Appellant and her two sisters were founded on a right common to them as against the Respondent; and we think that the Court ought to have held them entitled to prosecute the appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits; and upon the merits we are of opinion, for the reasons above given, that the Appellant and her sisters were well entitled to the *Zemindary*, as against the Respondent. We have, of course, not failed to consider the judgment of this Committee in 1884. Nor have we failed to observe that, in a recent edition of his *Treatise on the Hindoo Law of Inheritance*, Mr. *Strange*, one of the Judges of the *Sudder Court of Madras*, has expressed an opinion adverse to the conclusion at which we have arrived. But we think it probable that the case was not so fully discussed and examined in 1844, as it has been on the present hearing; and, at all events, we do not feel ourselves justified in holding the Appellant bound by the opinion which was then expressed, which, though of course entitled to the greatest possible respect, was not necessary to the decision then arrived at. And, as to the opinion expressed by Mr. *Strange*, it seems to rest upon the opinions of the *Pundits*, and the proceedings of the Courts which we have now been called upon to review.

If that opinion had been supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it; but as the case stands upon the authorities, we feel bound to give effect to the conclusion at which we have arrived.

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We shall, therefore, humbly recommend Her Majesty to reverse the decrees and others complained of by this appeal; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the *Sudder Court*, ought to have been and ought to be dismissed; and in the suit of 1845 to declare that *Sowmia Natchiar* and *Mootoo Vadooga* were not, nor was either of them, but that the Appellant and her sisters were, as against the Respondent, entitled to prosecute the appeal, and to recover the *Zemindary*—this declaration to be without prejudice to the rights of the Appellant and her sisters *inter se*; and, further, to declare that an account ought to have been and ought to be directed of the rents and profits of the *Zemindary* received by the Respondent, or by his order, or for his use, since the death of *Anga Modtoo Natchiar*, with directions for payment to the parties entitled of what should be found due upon the account; and also to declare that the *Zemindary* ought at once to be put into the hands of the Collector, or of a Receiver to be appointed by the Court, with liberty to the Appellant and her sisters, or any of them, to apply at the Court as they may be advised. We shall further recommend that the case be remitted to the *Sudder Court*, with directions to carry these declarations into effect; but we shall not recommend that any costs be given of the suit of 1856, or of this appeal, or of any of the proceedings below. But any costs to which the Appellant has been subjected must be refunded.





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An appeal was made to the *Sudder* Court at *Calcutta*, but in consequence of the absence from illness of the Appellant's *Mohattar*, the reasons of appeal were not stated within six weeks, the time prescribed by Act No. XV. of 1833, sec. 6, and the appeal was dismissed. Upon application for readmission of the appeal, the Court allowed that there had been a delay, and that the

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